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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARKLA, INC. (formerly ARKANSAS LOUISIANA GAS COMPANY),
Petitioner,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, STONEY G. MEYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, NEW ORLEANS, CO-TESTAMENTARY EXECUTORS OF THE SUCCESSION OF SEYMOUR WEISS

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below exceeded its review authority by (a) ordering the Federal Energy Regulatory Commission to grant the application of the natural gas producer respondents, Frank J. Hall, et al., for waiver of the notice and filing requirements of Section 4(d) of the Natural Gas Act instead of remanding the case to the Commission for further consideration, and (b) substituting the court's judgment for that of the Commission on matters within the Commission's expertise.

2. Whether the decision of the court below is in conflict with, and the claim of respondents Hall, et al., is barred by, the decision of this Court in *Arkansas Louisiana Gas Company* v. *Hall*, 453 U.S. 571 (1981).

3. Whether waiver of the requirements of Section 4(d) of the Natural Gas Act is available for collection of a retroactive rate increase notwithstanding the prohibition of that Act against retroactive rate increases and reparations.

4. Whether it was error for the court below to fail to provide a remedy to permit consideration of Petitioner's and the Commission's suggestions for rehearing *en banc* or to refer the matter to this Court for an appropriate remedy in the exercise of this Court's supervisory powers, when, because of the recusal of nine of the thirteen members of the court below, the opportunity for *en banc* rehearing as provided in the Judicial Code (28 U.S.C. § 46(c)) and the rules of the court below was denied as the result of an absence of quorum even for consideration of the suggestions for rehearing *en banc*.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATUTES AND REGULATIONS INVOLVED	2
JURISDICTION	3
STATEMENT OF THE CASE	3
A. Origin Of The Claim For A Retroactive Rate Increase	3
B. Proceedings In The State Courts	5
C. Prior Proceedings In This Court	6
D. The Commission's Order Denying Hall's Application For Waiver Of The Notice And Filing Requirements Of Section 4(d) Of The NGA	7
E. Proceedings In The Court Below	10
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	28
APPENDIX:	
Appendix A	1a
Appendix B	37a
Appendix C	50a
Appendix D	90a
Appendix E	110a

TABLE OF AUTHORITIES

CASES: Page

American Telephone & Telegraph Co. v. *United States*, 299 U.S. 232 (1936) 17

Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981) 2, 3, 7, 10, 11, 12, 19, 21, 22, 23, 24

Banks v. *FAA*, 687 F.2d 92 (5th Cir. 1982) 14

City of Piqua v. *FERC*, 610 F.2d 950 (D.C. Cir. 1979) 21, 25

Continental Oil Co. v. *FPC*, 236 F.2d 839 (1956), *certiorari* denied, 352 U.S. 966 (1957) 12, 24, 25

Eastern Petroleum Co. v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971) 4, 5

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 14

FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) .. 25

FPC v. *Idaho Power Co.*, 344 U.S. 17 (1952) 14

FPC v. *Interstate Natural Gas Co.*, 336 U.S. 597 (1949) 25

FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) 12

FPC v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) 17, 18

FPC v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976) 14-15

FPC v. *United Gas Pipe Line Co.*, 393 U.S. 71 (1968) 15

Gillring v. *FERC*, 566 F.2d 1323 (5th Cir.), *cert.* denied, 439 U.S. 823 (1978) 21

Hall v. *Arkansas Louisiana Gas Company*, 359 So.2d 255 (La. App.2d Cir. 1978) 5

Hall v. *Arkansas Louisiana Gas Company*, 368 So.2d 984 (La. 1979) 6

Hall v. *Arkansas Louisiana Gas Company*, 379 So.2d 1142 (La. App.2d Cir. 1980) 6

Huber Corp. v. *Denman*, 367 F.2d 104 (5th Cir. 1966) 5

Indiana & Michigan Electric Co. v. *FPC*, 502 F.2d 336 (D.C. Cir. 1974) 26

Mobil Oil Corp. v. *FPC*, 463 F.2d 256 (D.C. Cir. 1971), *certiorari* denied, sub. nom., *Mobil Oil Corp.* v. *Matzen*, 406 U.S. 976 (1972) 5

Table of Authorities Continued

Page

Montana-Dakota Utilities Co. v. *Northwestern P.S.C.*, 341 U.S. 246 (1951) 19

Morris Mizel, et al., 30 FPC 1103 (1963) 5

Nilsen v. *City of Moss Point*, 701 F.2d 556 (5th Cir. 1983) 20

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) . 17

Presbyterian Hospital of Dallas v. *Harris*, 638 F.2d 1381 (5th Cir. 1981), *certiorari* denied, 454 U.S. 940 (1981) 14

Shell Oil Co., 29 FPC 498 (1963) 5

Shell Oil Co. v. *FPC*, 334 F.2d 1002 (1964) 12, 24, 25

United Gas Pipe Line Co. v. *Mobile Gas Corp.*, 350 U.S. 332 (1956) 24, 25, 26

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) 14

West Texas Gathering Co., 29 FPC 510 (1962) 5

Western Pacific Railroad Corp. v. *Western Pacific Railroad Co.*, 345 U.S. 247 (1953) 27

STATUTES:

Federal Power Act:

Section 205(d) [16 U.S.C. § 824d(d)] 12

Natural Gas Act:

Section 4 [15 U.S.C. § 717c] 2

Section 4(d) [15 U.S.C. § 717c(d)] 2, 5, 6, 7, 8, 12, 24, 25

Section 4(e) [15 U.S.C. § 717c(e)] 22, 25

Section 19(b) [15 U.S.C. § 717r(b)] 2, 3

Judicial Code (28 U.S.C.):

Section 46(c) 27

Federal Energy Regulatory Commission Regulations (18 C.F.R.):

Sections 154.91 to 154.95 2

Sections 154.98 ..... 2, 24

Sections 157.40 5

Table of Authorities Continued

Page

MISCELLANEOUS:

Martin, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Mineral Rights*, 40 LA. L. REV. 588 (1980) 110a

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ARKLA, INC. (formerly ARKANSAS LOUISIANA GAS COMPANY, herein "Arkla") petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case entered November 26, 1982.

OPINIONS BELOW

The opinion of the court of appeals, of which reversal is here sought, and Chief Judge Clark's dissent (App. A, *infra*, pp. 1a to 29a) are reported at 691 F.2d 1184. The order of the Federal

Energy Regulatory Commission ("Commission" or "FERC")[1] denying the application of Frank J. Hall, *et al.* ("Hall") for waiver of the notice requirements of Section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d) ("NGA"), to permit Hall to collect a retroactive rate increase from Arkla, which order was reversed by the court of appeals (App. B, *infra*, pp. 37a to 49a), is reported at 13 FERC ¶ 61,000 (1980). The *per curiam* opinion of the court of appeals denying Arkla's petition for rehearing and the suggestions for rehearing *en banc* of the Commission and of Arkla and Chief Judge Clark's dissent therefrom are part of Appendix A, *infra*, pp. 30a-33a, as is the court of appeals' order denying Arkla's motion for relief from the order denying *en banc* rehearing, *infra*, p. 34a.

Hall's initial attempt to secure the retroactive increase in rates through a state court action for damages for breach of contract, which was also the subject of the application for waiver of the NGA's requirements, was before this Court in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) ("*Arkla* v. *Hall*"). In that case, this Court reversed the state court judgment awarding damages for breach of contract to Hall on the ground that the damage award was a retroactive rate increase barred by the filed rate doctrine and the prohibition of the NGA against retroactive rate increases. This Court's opinion in *Arkla* v. *Hall* is Appendix C to this petition, *infra*, pp. 50a to 89a.

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 4 and 19(b) of the NGA, 52 Stat. 822 and 831, 15 U.S.C. §§ 717c and r(b). The Commission's regulations involved in the case are 18 CFR §§ 154.91-154.95 and 154.98. The statute and regulations are Appendix D to this petition, *infra*, pp. 90a to 109a.

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[1] On October 1, 1977, the relevant responsibilities of the Federal Power Commission ("FPC") were transferred to FERC. 10 CFR § 1000.1(d) (1980). The term "Commission" in this petition refers to the FPC when referring to action taken prior to October 1, 1977 and to FERC when referring to action taken after that date.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1982 (App. A, *infra*, p. 1a). A timely petition for rehearing and for rehearing *en banc* were denied[2] on March 14, 1983 (App. A, *infra*, p. 30a). Arkla's motion for relief from the order denying *en banc* rehearing was denied on April 27, 1983 (App. A, *infra*, p. 34a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the NGA, 15 U.S.C. § 717r(b).

STATEMENT OF THE CASE

This case involves Hall's second effort to secure the same retroactive rate increase that this Court ruled in *Arkla* v. *Hall* was barred by the filed rate doctrine and the NGA's prohibition against retroactive rates. *Arkla* v. *Hall*, 453 U.S. at 579, n. 8. This second effort is based on the same purchase and sale contract and favored nation clause, on the identical facts, and on the same award of damages by the Louisiana courts which were before this Court in *Arkla* v. *Hall*.

A. Origin Of The Claim For A Retroactive Rate Increase

Hall's claim for a retroactive rate increase arises out of a contract between Hall and Arkla for the sale of natural gas produced from Hall's wells in the Sligo Gas Field, Bossier Parish, Louisiana, which is on file with the Commission as Hall's FPC (now FERC) Gas Rate Schedule No. 4. The contract set forth a schedule of fixed prices, including specified increases to be effective at five year intervals up to an agreed maximum. Additionally, the contract contained a "favored nation clause" which, in pertinent part, provided that if Arkla

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[2] The suggestions for rehearing *en banc* filed by the Commission and Arkla were not "denied" in the sense that the suggestions were considered on their merits and found wanting. Because of judge disqualification, a quorum of Fifth Circuit judges was not available to consider the suggestions. *See* Chief Judge Clark's dissent to the denial of panel rehearing, App. A, *infra*, p. 30a.

"should purchase from another party Seller gas produced from wells located in the Sligo Gas Field at a higher price than is provided to be paid under this agreement" Hall would be entitled to such higher price for its gas.

In 1961, Arkla acquired from the United States an interest in a lease on lands in the Sligo Field.[3] As was its right, the United States demanded royalty payments from Arkla based on market value which exceeded the prices in the Hall contract. Arkla's only options were either to relinquish its interest in the lease or accede to the United States' demands.

Before deciding on its course of action, Arkla sought legal advice on the question of whether the royalty payments would trigger the favored nation provision. Arkla received legal advice that the royalty payments would not trigger the favored nation provision because the royalty payments under both Louisiana law and federal law did not constitute a price paid for the purchase of gas.[4]

About 10 years later, a federal appeals court held in *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971), that the payment of royalties to the State of Arizona for helium gas was a price paid another seller within the meaning of a contract provision which the court construed as relating to

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[3] Arkla's acquisition of that lease interest was a matter of public record, the assignment of the lease having been recorded in the public records of Bossier Parish.

[4] The Commission's order of November 5, 1980, denying Hall's application for waiver of the notice and filing requirements of the NGA found that in 1961 "the Commission might well have concluded that the favored nations clause was not triggered" (App. B, *infra*, p. 48a) and that the present Commission's "own view of the record . . . leads us to conclude that Arkla could have reasonably assumed that the government royalty payment did not trigger the indefinite price escalator in the contract with the Hall group." (App. B, *infra*, p. 48a-49a). *See also* Martin, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Mineral Rights*, 40 LA. L. REV. 588, 601 (1980) (App. E, *infra*, p. 110a).

both lease and purchase transactions. In 1974, Hall, relying heavily on the *Eastern Petroleum* decision, instituted a suit for breach of contract claiming that Arkla's royalty payments to the United States had triggered Hall's right to higher prices under the favored nation clause. Instead of filing for a change in rates as required by Section 4(d) of the NGA and for waiver of the 30-day notice period therein provided, if the change in rates was to be effective on less than 30 days' notice, Hall, in 1974, brought its action in a Louisiana state court, seeking damages for the period September 1961 to December 1975.[5]

B. Proceedings In The State Courts

The trial court held that Arkla's royalty payments had triggered the favored nation provision, but denied recovery for the period from September 1961 through September 1972 because Hall had not made the rate filing required by the NGA. Recovery was allowed from October 1972 to December 1975.[6]

The Louisiana Court of Appeal affirmed the trial court. *Hall* v. *Arkansas Louisiana Gas Company*, 359 So.2d 255 (La. App. 2d Cir. 1978). On review by the Louisiana Supreme

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[5] It is not unlikely that Hall's deliberate decision to ignore the requirements of the NGA and to seek a retroactive rate increase through the state courts in the guise of damages for an alleged breach of contract was influenced by the prospect of an adverse interpretation by the Commission of the favored nation provision since Commission precedents then in existence clearly established that royalty payments do not constitute a purchase and sale transaction. *Morris Mizel, et al.*, 30 FPC 1103, 1104 (1963); *Shell Oil Co.*, 29 FPC 498 (1963); *West Texas Gathering Co.*, 29 FPC 510 (1962); *Huber Corp.* v. *Denman*, 367 F.2d 104 (5th Cir. 1966); *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (D.C. Cir. 1971), *cert. denied, sub nom., Mobil Oil Corp.* v. *Matzen*, 406 U.S. 976 (1972).

[6] By October 1972, Hall had obtained the status of a small producer which under the Commission's regulations (18 CFR § 157.40) exempted Hall from the filing requirements of Section 4(d) of the NGA, provided the increased rates are within the just and reasonable area rates established by the Commission.

Court,[7] it was held that Hall was excused from compliance with the filing requirements of the NGA and, therefore, entitled to recovery for the period between 1961 and 1972 because Arkla failed to inform Hall of the royalty payments and thereby prevented Hall from complying with the NGA. The Louisiana Supreme Court ruled that had Hall filed a rate increase with the Commission, it would have been approved, and remanded the case to the trial court for the calculation of damages for that period. *Hall* v. *Arkansas Louisiana Gas Company*, 368 So.2d 984 (La. 1979). On remand the trial court entered judgment in accordance with the Louisiana Supreme Court's decree which was affirmed by the Louisiana Court of Appeal. *Hall* v. *Arkansas Louisiana Gas Company*, 379 So.2d 1142 (La. App. 2d Cir. 1980).

C. Prior Proceedings In This Court

Arkla filed petitions for writs of *certiorari* in Case No. 78-1789 challenging the judgment of the Louisiana Supreme Court and in Case No. 79-1896 challenging the Louisiana Court of Appeal's affirmance of the trial court's money judgment on remand from the Louisiana Supreme Court.

After the Louisiana Supreme Court's award of damages but prior to this Court's grant of Arkla's petition for *certiorari* in No. 78-1789, Hall, on May 24, 1979, filed with the Commission an application for waiver of the notice and filing requirements of Section 4(d) of the NGA to permit Hall to collect retroactive rate increases relating back to 1961 - some 18 years before Hall made its filing with the Commission. In response to this Court's invitation, in Case No. 78-1789, the United States in February 1980 filed its brief as *amici curiae*, in which the

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[7] The Louisiana Supreme Court granted Hall's and denied Arkla's petition for review of the intermediate appellate court's decision. Arkla sought *certiorari* in this Court on the question of whether the interpretation of the favored nation clause should have been referred to the Commission. This Court denied the petition. 444 U.S. 878 (1978).

government advised the Court of the pending application for waiver and suggested that the Court "may wish to hold the petition to await the Commission's action" since grant of the waiver might moot the case. Arkla's petition in No. 78-1789 remained pending and on November 5, 1980, the Commission denied the waiver application, 13 FERC ¶ 61,000 (1980) (App. B, *infra*, pp. 37a to 49a). Thereafter, the United States filed its supplemental memorandum in which it advised the Court of the denial of the application for waiver and recommended "that the Court grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of Louisiana."

This Court subsequently granted Arkla's petition in Case No. 78-1789 (449 U.S. 1109 (1981)), and on July 2, 1981 in *Arkla* v. *Hall*, *supra*, reversed the Louisiana Supreme Court, ruling that the Louisiana court's award of damages amounted to an "award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case" which was barred by the filed rate doctrine and the prohibition of the NGA against retroactive rates. *Arkla* v. *Hall*, 453 U.S. at 578-579, 580. In a separate order also issued July 2, 1981 (453 U.S. 917), the Court granted Arkla's petition in Case No. 79-1896, reversed the Louisiana Court of Appeal's monetary judgment against Arkla and remanded the case for further consideration in light of the Court's decision in *Arkla* v. *Hall*, *supra*.

D. The Commission's Order Denying Hall's Application For Waiver Of The Notice And Filing Requirements Of Section 4(d) Of The NGA

Hall's application for waiver of the notice requirements of Section 4(d) of the NGA[*] was conditional. Hall contended that a

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[*] Hall's application did not comply with Section 4(d) which requires that notice of the change in rates shall be given by filing and posting a new rate schedule plainly stating the changes. No new rate schedule was filed by Hall with the application and none has ever been filed by Hall.

waiver of the filing requirements was not necessary because Section 4(d) has no applicability to a judicial award of damages for breach of contract and requested a ruling from the Commission to that effect (App. B, *infra*, p. 39a). Alternatively, Hall alleged as good cause for granting the waiver that timely compliance with the requirements of Section 4(d) "was impossible" because Arkla "had concealed the facts that would have made timely notice possible" and that Hall was "now for the first time, able to file the appropriate information with the Commission."[9]

In its order of November 5, 1980, denying Hall's application for waiver, the Commission first rejected Hall's contention that Section 4(d) was inapplicable, ruling that the filed rate doctrine applied to the award of damages for the 1961-1972 period since the damage award constituted a retroactive rate increase without the Commission having determined that the new rate is just and reasonable to the detriment of the Federal statutory scheme (App. B, *infra*, pp. 40a-46a).

The Commission then ruled that good cause had not been shown and denied the waiver on a number of grounds (App. B, *infra*, pp. 46a-49a). The Commission noted that there is a strong "statutory bias" against retroactive rate increases under the NGA. The Commission found that the retroactive rate increase in this case would be "particularly unacceptable" because of the "uncommonly severe nature of the retroactivity imposed" since consumers would be exposed to liability for higher rates beginning in 1961 and continuing for some 11 years thereafter—a result the Commission found it "simply cannot sanction" (App. B, *infra*, p. 46a).

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[9] May 24, 1979, was not, of course, the first time Hall was "able to file the appropriate information with the Commission." Hall was obviously possessed of all the information necessary to comply with Section 4(d) in 1974 when Hall made a conscious and deliberate decision to by-pass the Commission and initiate an action for damages in the state courts to secure the retroactive rate increase.

The Commission found further that the waiver should be denied because of the "possible unsettling effect that a waiver in this case might have on other gas purchase transactions" since the grant to Hall of a higher rate for its gas effective in 1961 posed "a strong likelihood that claims would arise asserting that this increase triggered the operation of indefinite price escalator provisions in other contracts in the Sligo Field geographical area," involving pipeline companies other than Arkla, and opening "the door to additional rate increase requests and to requests for waiver for the same period" (App. B, *infra*, pp. 46a-47a).[10]

The Commission found, as a matter of policy, that it is not "in the public interest to take actions in the name of equity that have the potential for reopening transactions which took place almost 20 years ago." (App. B, *infra*, p. 47a).

The Commission held that it could not assume that if Hall had made a timely filing in 1961 that the Commission would have approved the increase, noting that the Commission might well have concluded that the royalty payments did not trigger the favored nation clause and that even if they did trigger the clause, in light of the Commission outlawing indefinite pricing provisions in 1961 in new contracts, the Commission might have determined that the public interest would not permit the grant of rate increases based on indefinite price escalation provisions in existing contracts (App. B, *infra*, p. 48a; *see also*, n. 5, *supra*, p. 5).

Finally, the Commission rejected Hall's only claim of good cause, pointing out (1) that the Louisiana courts did not find fraud or deceit in Arkla's failure to disclose information and (2)

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[10] Hall represents only 43 percent of the total interests committed to Arkla in the Sligo Field. If the waiver sought by Hall were granted, the other 57 percent interests would be entitled to the same retroactive rate increase sought by Hall. Non-litigants in the Sligo Field have made such claims upon Arkla. Additionally, royalty owners, at the instigation of Hall, have made claims upon Arkla for "compensatory damages."

that the Commission's "own review of the record before us leads us to conclude that Arkla could have reasonably assumed that the government royalty payment did not trigger the indefinite price escalator in the contract with the Hall group" (App, B, *infra*, pp. 48a-49a).[11]

E. Proceedings In The Court Below

After the Commission denied rehearing on January 2, 1981, of its order denying the application for waiver, 14 FERC ¶ 61,003 (1981), Hall filed a petition for review of the Commission's order in the court of appeals. Hall's petition for review was pending when this Court granted Arkla's petition for *certiorari* in case No. 78-1789, and was still undecided when this Court's July 2, 1981 opinion was rendered. *Arkla* v. *Hall*, 453 U.S. at 576, n. 6.[12]

In a 2 to 1 opinion rendered November 26, 1982, Chief Judge Clark dissenting, the court below reversed the Commission's order denying the waiver, and remanded the case to the Commission with specific instructions to grant the waiver and the

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[11] This Court in *Arkla* v. *Hall* took a similar view of Hall's appeal to equitable considerations to escape the filed rate doctrine arising out of Hall's claimed misconduct of Arkla in failing to inform Hall of the royalty payments. This Court said (453 U.S. at 583, n. 13): "We do not find this argument compelling. The court below did not find that Arkla intentionally failed to inform respondents of its lease payments to the United States in an effort to defraud them. Consequently, we are not faced with affirmative misconduct, and we need not consider the application of the filed rate doctrine in such a case," agreeing with the Commission's finding that Arkla "could have reasonably assumed that the government royalty payment did not trigger the [favored nation clause.]"

[12] On July 21, 1981, this Court denied Hall's motion for a stay of the mandate and extension of time for filing a petition for rehearing in Case Nos. 78-1789 and 79-1896. Hall's request was made principally on the ground that the Fifth Circuit review proceeding was pending and that this Court should withhold the mandate until that proceeding was complete.

retroactive rate increase, leaving to the Commission only the determination of the level of the retroactive rate increase. The court held that the waiver should be granted because this case does not involve a retroactive rate increase but rather delayed implementation of a contractually authorized rate increase. The court also held that the waiver provision of Section 4(d) of the NGA is available to permit a rate increase for a past period even though retroactive rate increases are barred by the NGA.[13]

In an order issued March 14, 1983, the court "denied" both Arkla's and the Commission's suggestions for rehearing *en banc*, and Arkla's petition for rehearing (App. A, *infra*, p. 30a). Chief Judge Clark dissented from the denial of panel rehearing, stating that due to the fact that nine of thirteen regular active service judges had disqualified themselves from the case, the denial of the suggestion for rehearing *en banc* gave an "erroneous impression" that the suggestions were considered on their merits by the thirteen judges, when, in reality, because of disqualifications the suggestions for rehearing *en banc* of the panel's decision could not even be considered due to the absence of a quorum of the court (App. A, *infra*, p. 33a). Arkla's motion for relief from the court's order denying *en banc* rehearing was denied on April 27, 1983 (App. A, *infra*, p. 34a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals presents multiple questions of substantial importance with respect to the proper role

[13] Arkla's motion to dismiss the review proceedings on the grounds of *res judicata* and collateral estoppel was preliminarily denied by the Court (App. A, *infra*, p. 36a) but carried along with the case on the merits. The Court's November 26, 1982 opinion denied the motion, principally on the ground that Hall had an "administrative action" for "rates" as distinguished from the claim for "damages" rejected by the Supreme Court in *Arkla* v. *Hall*, although the Supreme Court had ruled that the claim for damages was, in fact, a claim for a retroactive rate increase. 453 U.S. at 578-579, 580.

of the courts in reviewing the Commission's orders under the NGA. Moreover, since the relevant review provisions of the Federal Power Act ("FPA") "are in all material respects substantially identical" to the NGA, the decision will affect review of the Commission's orders under the FPA. The decision, if allowed to stand, will substantially undermine the Commission's administraton of both statutes. *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

The decision of the court of appeals also presents important questions of law as to whether it is in conflict (1) with the decision of this Court in *Arkla* v. *Hall*, *supra*, (2) with the decision of another panel of the Fifth Circuit in *Continental Oil Co.* v. *FPC*, 236 F.2d 839, 843 (1956), *cert.* denied, 352 U.S. 966 (1957), and (3) with the decision of the Third Circuit in *Shell Oil Company* v. *FPC*, 334 F.2d 1002 (1964). These conflicts involve fundamental errors committed by the court below in having reversed the Commission's order denying Hall's application for waiver and in awarding to Hall the same retroactive rate increase it was denied by this Court's decision in *Arkla* v. *Hall*.

Additionally, the decision of the court of appeals presents an important question involving the meaning and scope of Section 4(d) of the NGA, the outcome of which will significantly affect the Commission's administration of the NGA as well as the FPA. *See* Section 205(d) of the FPA. The question is one which this Court noted but did not find necessary to address in *Arkla* v. *Hall*, namely, whether waiver of the notice requirements of Section 4(d) "is available for retroactive collection of a higher rate than the one on file" with and approved by the Commission (453 U.S. at 578, n.8).

The decision of the court of appeals denying the suggestions for rehearing *en banc* of the Commission and Arkla because of the unusual circumstance of the recusal of 9 of the 13 members of the court of appeals presents the important question of whether a remedy is available to enable litigants seeking review of orders issued under the NGA to have the full opportun-

ity for *en banc* review as provided by the Judicial Code and the rules of the court below.

These important questions reach beyond this immediate case and its litigants. With respect to the proper role of the courts *vis-a-vis* administrative agencies, the questions presented may arise in any review of Commission orders under the statutes it administers and, indeed, may arise in any review of the orders of any of the federal administrative agencies. As for the availability of waiver of the notice provisions of the statutes administered by the Commission, the question presented can arise in any ratemaking proceeding involving natural gas pipeline companies and producers and in ratemaking proceedings involving electric companies. The court-ordered waiver of the Commission's regulations could undermine the statutory scheme as well as the regulations developed by the Commission to implement its responsibilities under the statute.

1. *The court below usurped the Commission's statutory authority in reversing the Commission's order denying Hall's application for waiver and failed to accord proper deference to the Commision's findings and expertise.*

The court ruled that the Commission's reasons for denying the waiver were based on an erroneous premise that the retroactive rate increase violated the NGA; the court also ruled that the Commission's policy against retroactive ratemaking was not involved. The court further found that the Commission's reasons for denying the waiver were not rational (App. A, *infra*, pp. 12a-22a). Instead of reversing and remanding the order to the Commission for further consideration consistent with the court's opinion, the court below made the finding that Hall had shown good cause for the waiver and directed the Commission to grant the waiver and the increase, leaving to the Commission only the determination of the level of the increase based on restrictions from the court on that matter (App. A, *infra*, pp. 22a-26a).

a. Even assuming, *arguendo*, that the court was right in overturning the Commission's order as an abuse of discretion, the court nonetheless exceeded its authority by substituting itself for the Commission in determining that "good cause" existed to grant the waiver and prohibiting Commission reconsideration of the matter on remand. Rather than permitting the Commission to supply record support where the majority found the present record inadequate or to reconsider whether other reasons might militate against the waiver, the court completely foreclosed that result by deciding, on its own, that good cause existed for the waiver and directed grant of the waiver and rate increase.

The function of a court of appeals on review of an administrative agency's order is to lay bare and correct an error of law. When the appellate court has done that, it has exhausted the only power which Congress gave it. The court's review function is at an end and the agency's order is to be remanded to the administrative agency for reconsideration in light of the court's opinion.

As this Court said in *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952), the "power 'to affirm, modify or set aside' the order of the Commission in whole or in part" is "not power to exercise an essentially administrative function." As another panel of the Fifth Circuit said in *Banks* v. *FAA*, 687 F.2d 92, 96-97 (5th Cir. 1982), citing *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-525 (1978):

> "We are ill-equipped to decide whether new hearings could be productive in this proceeding, or whether the appellants must be made whole without further hearings. We leave this to the administrative agency."

See also FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *Presbyterian Hospital of Dallas* v. *Harris*, 638 F.2d 1381, 1389 (5th Cir. 1981), *cert.* denied, 454 U.S. 940 (1981). The court below overstepped the bounds of its review authority in issuing its order in this case and improperly propelled itself into the domain reserved to the Commission. *FPC* v.

Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976); *FPC* v. *United Gas Pipe Line Co.*, 393 U.S. 71 (1968).

The Court's error in this case is manifested in the rationale that it used to justify the grant of the waiver, a rationale which is at war with the basic scheme of rate regulation under the NGA. The court in determining that the waiver and retroactive rate increase should be granted sought to avoid the adverse impact that the increase would have on consumers by suggesting to the Commission that it could protect the consumers if Arkla were denied the right to recover the increase from its customers and suggested that Arkla's failure to inform Hall of the royalty payments warranted denial of such recovery. The court's reasoning would stand NGA rate regulation on its head. Judge Clark's dissent (691 F.2d at 1199) set the matter straight:

> "The majority assumes that the Commission, in its discretion, may and should deny Arkla the rate increase it will surely seek as a result of today's decision. I respectfully disagree. Under the due process clause no public utility may be compelled to absorb its own costs. The most basic of such costs are expenditures for gas purchases, whether incurred routinely or, as here, as the final product of protracted litigation. Because Arkla's ratepayers rather than Arkla received the benefit of its noncompliance with the 'most favored nation' clause in the 1960s, it follows inevitably, in my view, that the ratepayers must bear the burden of Arkla's belated compliance now."

The effort of the court below to convince the Commission that it could at one and the same time grant a retroactive rate increase to Hall and deny Arkla recovery of that increase from its customers is not only groundless but emphasizes the error of the court in overstepping its bounds and improperly projecting itself into the Commission's domain. In its suggestion for rehearing *en banc*, which was not considered for lack of a quorum, *infra*, pp. 26-28a, the Commission advised the court below that it could not legally deny Arkla recovery of the increase in costs flowing from the waiver because Arkla had

acted properly under the NGA. The Commission stated (Commission suggestion for rehearing *en banc*, pp. 8-9):

> "To be sure, the Commission may disallow 'imprudent' expenditures from being passed on to ratepayers. *See, e.g., Missouri ex rel. Southwestern Bell Telephone Co.* v. *PSC*, *supra*, at 289 n. 1, (Brandeis and Holmes, JJ. concurring). But there was no imprudence in this case. As the panel majority acknowledged, Arkla's 'delay' resulted from the fact that the pipeline acted on an opinion of counsel that the royalty payment did not bring into the play the 'favored nation clause.' Slip op. at 780. The 'delay' stemmed from the pipeline's 'non-fraudulent' (*id.* at 787) attempt to hold rates down."

The Commission noting the anomolous result produced by the court's decision under the NGA, went on (*id.* at 9):

> "To hold that such conduct is imprudent, is to empty that standard of any real meaning. Moreover, it would lead to anomolous results. Thus, under the approach suggested by the majority in this case, pipelines would be discouraged from resisting producer demands in acting on behalf of customers to keep rates down in close cases. For, as the majority concedes, had Arkla agreed at an early stage that the royalty triggered a rate increase to Hall and made timely payment, the pipeline could recoup its costs from customers. However, by resolving doubts in favor of customers and litigating the issue, Arkla's conduct somehow can be termed 'imprudent,' thus, barring any recovery from its ratepayers when it is determined that it is obliged to pay its seller. Such an incongruous result stands in marked contrast to the Supreme Court's statement that the Commission must counter the lack of incentives pipelines have 'to bargain prices down.' *FPC* v. *Texaco*, *supra*, 417 U.S. at 391."

b. In addition to exceeding its review authority in directing the commission to grant the waiver and the rate increase, *supra*, pp. 14 to 16, the court of appeals also exceeded its review functions by failing to give proper deference to the Commission's findings, expertise and experience and in substituting the court's judgment for that of the Commission. As

stated by this Court in *Permian Basin Area Rate Case*, 390 U.S. 747, 767 (1968):

> "Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts."

And *see: American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236-237 (1936): "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers . . . What has been ordered must appear to be "the expression of a whim rather than an exercise of judgment."

One example of the many instances of the court's failure to respect the Commission's informed and expert judgment, and the substitution of its judgment for that of the Commission in an area where the court has no expertise is the rejection of what the court below described as the "most compelling reason" for denial of the waiver, i.e., that consumers would be exposed by the waiver to a potential liability for higher rates for 11 past years (1961-1972), a retroactive effect of "uncommonly severe nature." The court below stated that the Commission's concern was "that 1980 consumers might be exposed to liability for rates attributable to 1961 consumers"; that "a different group of consumers will pay for the gas than the one which used it." (691 F.2d at 1193). While conceding that logic supports this concern, the majority opinion concluded that the "Commission's reasoning lacks a firm basis of support" because "the record is devoid of information in this regard." But no evidence is needed to support the concededly logical proposition that the 1961 consumers are not identical with the consumers that more than 20 years later will be called upon to pay the increase. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962). In *Tennessee*, this Court, reversing the Fifth Circuit which had held that the Commission abused its discretion, affirmed a Commission order providing for prompt refunds, noting that "the transient nature of our society . . .

often prevents refunds from reaching those to whom they are due." 371 U.S. at 154-55. There was no evidence to support this statement and none was necessary. Logic is enough.[14]

In addition to being wrong on this count, the court also misstated the Commission's concern which was the exposure of consumers to liability for 11 years of higher charges *whether the consumers were the same or not the same* as the dissenting opinion of Chief Judge Clark correctly pointed out (691 F.2d at 1199). As the dissent demonstrated, the majority opinion mistakenly focused on the equities between Arkla and Hall when "the balance must be struck between the ratepayers and Hall" for the primary purpose of the NGA is protection of the consumers (691 F.2d at 1199). The Commission's concern regarding the severe impact on consumers was a reasonable and rational exercise of the Commission's discretion and is strengthened, not weakened, by the fact that in a period of more than 20 years there are bound to be changes in the identity of the consumers as the dissent points out (691 F.2d at 1199). The Commission could legitimately take into account in exercising its discretion to deny the waiver that if the waiver was granted the Commission would be forced to permit Arkla to recover the increase from its ratepayers (691 F.2d at 1199).

2. *The decision of the court below is in direct conflict with the decision of this Court in Arkla* v. *Hall, supra, on matters*

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[14] The egregious nature of the court's substitution of its judgment for the Commission's is shown by its reliance on an unsupported assertion during oral argument by Hall's counsel that "to the best of his information, the gas purchased from Hall was sold by Arkla to line industries in Southwest Arkansas wherein the possibility that consumers over the twenty-year period would be similar is more probable." 691 F.2d at 1193, n.15. The assertion is an absurdity. Arkla is an integrated utility with multiple sources of gas which are commingled in its lines. In such circumstances the ability to trace particular molecules of gas from a point of production in Louisiana to particular customers in Arkansas is impossible.

that are critical to the court of appeals' reversal of the Commission's order denying Hall's application for waiver.

Acknowledging that in light of this Court's decision in *Arkla* v. *Hall*, "the only avenue available to Hall, *if any exists at all*, is the administrative one *arguably* provided by Section 4(d)," the court of appeals ruled that such an "administrative component to this case . . . remains alive" because "[a]lthough Hall is not entitled to *contractual damages* by virtue of the filed rate doctrine, it is entitled to the *rates* which it contracted with Arkla to receive over which the Commission has authority to regulate" and because the rate increase sought by Hall is not a retroactive rate increase (App. A, *infra*, p. 13a; 691 F.2d at 1191-1192; emphasis supplied).

The court of appeals' effort to distinguish between "contractual damages" and "rates" was made by Hall to this Court in *Arkla* v. *Hall*. Hall argued that the award of the Louisiana courts was one for compensatory damages for breach of contract to which the filed rate doctrine has no application. This Court held that the compensatory damages, which represented the difference between the contract rates paid by Arkla and the contract rates Hall contended Arkla should have paid had the favored nation clause gone into effect, were an award of a retroactive rate increase barred by the filed rate doctrine and the NGA's prohibition against retroactive rates. 453 U.S. at 574, 578-579, 580. Thus, the distinction attempted by the court below between the compensatory damages (or contractual damages) and rates is non-existent. They are one and the same—a claim for a retroactive rate increase. The lower court has engaged in a futile attempt to separate the inseparable, *Cf. Montana-Dakota Utilities Co.* v. *Northwestern P.S.C.*, 341 U.S. 246, 251 (1951); and its decision is in a head-on collision with the ruling of this Court in *Arkla* v. *Hall*.

The court's effort to avoid the bar created by this Court's decision on the ground that the parties are not the same and the actions are not identical is also without merit. In each action the parties are Hall and Arkla as the court below recognized when it referred to the "present action," *i.e.*, the administra-

tive action, as "involving Hall and Arkla" (App. A, *infra*, p. 11a; 691 F.2d at 1194). The actions are also identical. Each is based on and arises out of the same gas purchase contract, the same favored nation clause, and the same facts. In each the objective is the same, to secure nothing less than a retroactive rate increase. The conflict between the decision of the court below and of this Court in *Arkla* v. *Hall* results entirely from the effort of Hall to relitigate the same issues.[15] Hall made his selection freely, to seek damages in the state courts and not to seek a waiver from the Commission. Hall is bound by that election and is not entitled to two bites at the cherry because the first bite was unsuccessful.

Hall's determination not to pursue any remedy through the Commission is particularly illustrated by Hall's vigorous opposition to Arkla's 1975 filing with the Commission, in FERC Docket No. RI76-28, requesting issuance of a declaratory order asserting the Commission's primary jurisdiction over the dispute. Hall successfully defeated Arkla's efforts to have the matter heard by the Commission, but did not make the "conditional" filing for a waiver until 1979 and, ironically, made it in the same declaratory order proceeding initiated by Arkla. It is clear that in opposing Arkla's 1975 filing, Hall was determined to pursue its remedy *only* in the state court. Hall has done so and lost, and is not entitled to start over with an alleged administrative remedy. The court below ordered the FERC to raise the price during the period involved. This Court's judgment prohibits the award of damages during the period that Hall was subject to Commission jurisdiction. The two decrees are irreconcilable.

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[15] In a case decided *en banc* since its decision in the present case, *Nilsen* v. *City of Moss Point*, 701 F.2d 556, 560 (5th Cir. 1983), the Fifth Circuit stated that ". . . one who has a choice of more than one remedy for a given wrong . . . may not assert them serially, in successive actions, but must advance all at once on pain of bar." In *Nilsen*, the Court held a subsequent claim was barred when a job bias claimant whose Title VII claim was dismissed for failure to make the requisite EEOC filing, attempted to assert a new action arising out of the same transaction and alleging the same discrimination.

Equally futile is the court of appeals' effort to avoid a conflict with this Court's ruling by attempting to transform the retroactive rate increase into a prospective rate increase, on the authority of *City of Piqua* v. *FERC*, 610 F.2d 950 (D.C. Cir. 1979).[16] A retroactive rate increase is no more transformed into a prospective rate increase by a waiver than the retroactive rate increase was transformed into compensatory damages by resort to a court lawsuit. 453 U.S. at 579, n. 8. *Piqua* does not support the court of appeals' decision, assuming, *arguendo*, *Piqua* was correctly decided.[17] In *Piqua*, as the D.C. Circuit emphasized, an agreed upon rate and agreed upon effective date were involved; there was no substitution retroactively of a different rate (610 F.2d at 955). In this case, in contrast, as the court below concedes (App. A, *infra*, p. 22a; 691 F.2d at 1196), there is no agreed upon rate.[18] A rate will have to be determined retroactively and substituted by the Commission.

The court of appeals' decision also collides with *Arkla* v. *Hall* when it asserts (691 F.2d at 1189) that this Court recognized the availability of the waiver provisions to permit an alteration of rates without a timely filing (691 F.2d at 1189). This Court's reference in a footnote to the waiver provision of section 4(d) did not recognize the use of that power to grant a retroactive rate increase (453 U.S. at 578, n. 8). Indeed, the Court in that same footnote expressly disavowed any intention to suggest

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[16] The court of appeals criticized the Commission's citation of *Gillring* v. *FERC*, 566 F.2d 1323, 1325 (5th Cir.), *cert. denied*, 439 U.S. 823 (1978), as support for the reference in its order to its "long-established 'statutory bias' against retroactive rate increases" (App. B, *infra*, p. 46a). The criticism is mistaken. As the court of appeals' own analysis of *Gillring* confirms, the Commission's citation of *Gillring* was on the mark (691 F.2d at 1191; App. A, *infra*, p. 13a).

[17] See *infra*, pp. 24-26.

[18] The court below while conceding that the facts of *Piqua* "are not totally analogous to this case" dismissed the distinctions as insignificant. (691 F.2d at 1191, n.13). The difference in facts between *Piqua* and this case is the difference between day and night.

that the waiver power is available for a retroactive rate increase, saying, "[a]ssuming, arguendo, that waiver is available for retroactive collection of a higher rate than the one on file . . . ."[19]

Even the court of appeals' finding of good cause is in conflict with this Court's decision in *Arkla* v. *Hall*. Although the court below did not provide any reasons for its finding, it apparently agreed with Hall that Arkla's failure to inform Hall of the higher royalty payments to the United States was the only reason why Hall failed to make the administrative filing for waiver with the Commission and to receive the higher rates (691 F.2d at 1191, 1193, 1198-99).[20]

Hall made the same appeal to equitable considerations in *Arkla* v. *Hall*, contending that the filed rate doctrine should not bar recovery when Arkla's misconduct in failing to inform Hall of the higher payments prevented filing of a higher rate (453 U.S. at 583). This Court did not find "this argument compelling," pointing out that Arkla did not intentionally fail to inform Hall in an effort to defraud Hall and agreeing with the Commission, which had also rejected the same argument in

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[19] We show later that waiver is not available for retroactive rate increases as the Supreme Court, the Third Circuit, and the Fifth Circuit have held, *infra*, pp. 24-26.

[20] As already noted, n.9, *supra*, p. 8, Arkla cannot possibly be blamed for Hall's failure to file for a waiver between 1974 and 1979. Additionally, contrary to the court's assumption that Hall would have received the higher rates if it had made a filing therefor, if Hall had made a rate change filing in 1961 as required by Section 4(d) of the NGA, the receipt of the higher rates was not a certainty. The filing would have been subject to suspension and refund and Hall would have had the burden of proof to show that the new higher rate was authorized by the favored nation clause and was just and reasonable. 15 U.S.C. § 717c(e). The Commission, consistent with its precedents, could well have held that the favored nation clause was not triggered or, if triggered, that the higher rate exceeded the allowable ceiling rate. *See* n.5, *supra*.

denying waiver, that Arkla "could have reasonably assumed that the government royalty payment did not trigger the" favored nation clause (453 U.S. 583 and n. 13).

Similarly, in assuming that this Court in *Arkla* v. *Hall* merely noted the Commission's reasons for denying the waiver but neither adopted nor relied on them, the decision of the court below is again in conflict with *Arkla* v. *Hall*. With respect to Hall's contention that the filed rate doctrine was inapplicable to the case because the state court only determined "damages" suffered as a result of breach of contract and because no "federal interests . . . are affected by the state court's action," this Court rejected that contention on the ground that the Commission in its order denying waiver (citing the order) "found that permitting this damages award could have an 'unsettling effect . . . on other gas purchase transactions' and would have a 'potential for disruption of natural gas markets.' " 453 U.S. at 579. This Court did not thereby merely note the Commission's reason. This Court relied on the Commission's finding to reject Hall's contention.

With respect to the Commission's refusal to sanction the waiver because it would expose consumers to a multi-million dollar liability for higher rates beginning in 1961 and continuing for some 11 years thereafter, this Court rejected Hall's assertion that the damages awarded would be paid entirely from Arkla's corporate assets and would not be passed on to the consumers, saying (453 U.S. at 579, n. 10):

> "the record does not support respondents' assertion that Arkla could not pass the damages award along to its customers. In its order denying respondents' request for a waiver of the § 4(d) notice requirement, the Commission conceded that Arkla would have the right to do so, even though all the natural gas for which Arkla would be paying was long since sold. 13 FERC, at 61, 213."

Here, again, this Court relied on the Commission's finding and did not merely note the action taken by the Commission.

Thus, as has been demonstrated, the lower court's opinion is in direct conflict with *Arkla* v. *Hall* in many respects crucial to

its decision, particularly the lower court's finding that no retroactive rate increase is involved and this Court's finding that the damage award of the Louisiana courts was "nothing less than a retroactive rate increase" forbidden by the NGA.

3. *The effort of Hall to secure the retroactive rate increase denied by Arkla* v. *Hall presents the important question of whether "waiver is available for retroactive collection of a higher rate than the one on file" with the Commission.* 453 U.S. at 578, n. 8.

As this case demonstrates, the waiver provision of the notice requirement of Section 4(d) of the NGA is not intended, and should not be used, to authorize retroactive rate increases because of the adverse impact that retroactive increases have on consumers.[21] The court of appeals' decision, if allowed to stand, will seriously undermine the consumer protection intended to be provided by the prospective rate increase structure of the NGA.

The waiver provision of Section 4(d) of the NGA has received the attention of this Court in *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956); of the Fifth Circuit in *Continental Oil Co.* v. *FPC*, 236 F.2d 839, 843 (1956), *cert. denied*, 352 U.S. 966 (1957); and of the Third Circuit in *Shell Oil*

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[21] The waiver provision of Section 4(d) of the NGA provides as follows:

> "The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

The Commission's regulations (18 CFR § 158.98) implementing Section 4(d) provide:

> "Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule for a change in rate schedule to be filed prior to 90 days before the effective date."

Co. v. *FPC*, 334 F.2d 1002 (1964). Each of these courts has interpreted Section 4(d) of the NGA as meaning that the effective date of a change in rate cannot precede the date on which the notice is filed.

The decision of the court below and the decision of the D.C. Circuit in *Piqua*, as interpreted by the court below, are in direct conflict with these decisions. In *Mobile*, this Court explained that the 30 days' "*advance notice of changes* is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers under Section 4(e)" (350 U.S. at 342; emphasis supplied). In *Continental Oil*, citing *Mobile*, the Fifth Circuit said: "since it thus affirmatively appears that *prior* notice is required, it necessarily follows that the effective date of a change in rate cannot precede the date on which notice is filed" (236 F.2d at 843; emphasis in original). Similarly, in *Shell Oil* the Third Circuit affirmed an order of the Commission holding that the NGA prohibits any change in existing rates except in the manner provided in Section 4(d) and specifically holding that changes in filed rate schedules "must be prospective in operation" (334 F.2d at 1009). The Third Circuit went on to hold as follows (*id.*):

> "We find nothing in the Act which authorizes a natural gas company to retroactively amend existing rates either by contract or otherwise."

The fundamental purpose of the NGA and the companion FPA is to protect the ultimate consumers. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *FPC* v. *Interstate Natural Gas Co*, 336 U.S. 597, 581 (1949). Retroactive ratemaking and reparations are incompatible with that fundamental statutory purpose and are, therefore, barred by the NGA and FPA.

Waiver of the notice period to permit a rate increase to be effective retroactively nullifies important aspects of consumer protection incorporated into the NGA and FPA. Suspension of the increased rate is an important element of consumer protection for, unless the effective date of the rate change is suspended, the Commission is without power to order refunds

even if the Commission determines at the end of the investigation that the increased rates are unjust and unreasonable. The notice requirement in advance of the effective date serves the "essential" function of affording the consumers the opportunity to advise the Commission of their views respecting suspension of the rate change (whether it should be suspended and for what period) and "is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers under § 4(e)." *Mobile, supra*, 350 U.S. at 342. The Commission has no statutory power to suspend a rate change *after* the proposed effective date has passed. *Indiana & Michigan Electric Co.* v. *FPC*, 502 F.2d 336, 342-343 (D.C. Cir. 1974).

Congress intended that the just and reasonable rate standards of the NGA and the FPA should be prospective in effect. To that end the Commission was armed with powers to provide itself with the information needed to evalute the rate increase before it becomes effective and thereby to protect consumers through its suspension and refund powers. To misuse the waiver provision, as the court below has done, so as to authorize collection of a retroactive rate increase will frustrate the consumer protection intended by Congress in the prospective rate structure of the NGA.

4. *Review by this Court is particularly necessary because the Fifth Circuit was not able to complete the appellate process in this case.*

In dissenting from the denial of panel rehearing, Chief Judge Clark called attention to the fact that, because of disqualification of nine of the thirteen Fifth Circuit judges in regular active service, the court could not pass on the suggestions for rehearing *en banc* filed by Arkla and the Commission. The problem described by Chief Judge Clark is a serious one as it affects every case before the Fifth Circuit in which the Commission is a party. In order to avoid regular problems with recusals in these cases, the Fifth Circuit established a "Gas Panel" to hear all cases before the court in which the Commission is a party. While the Fifth Circuit still has enough regular active service

judges to constitute a panel, the number of judges who consider themselves capable of serving on these gas cases has dwindled to four. Consequently, when read with the rules on *en banc* rehearings, the clear result in every case is that the parties are denied the opportunity even to have a suggestion for rehearing *en banc* considered because the remaining four judges *do not* constitute a quorum under 28 U.S.C. § 46(c). Thus, they can technically neither grant nor deny any such suggestion.

Although Arkla recognizes that this Court has stated in *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U.S. 247 (1953), that the litigants do not have a "right" to have their appeal reviewed by every one of the circuit judges and that the device of rehearing *en banc* looks primarily toward avoiding intracircuit conflicts, the Court also stated that even though not a right, it is important that the rules should be applied in such manner as to accomplish their objective (345 U.S. at 258-261).

In this case, when Hall appealed to the Fifth Circuit in January 1981, for review of the Commission's order, Arkla promptly intervened and joined with the Commission in moving the court for an order, pursuant to 28 U.S.C. § 2112(a), transferring the case to the United States Court of Appeals for the District of Columbia Circuit where one branch of this same case was pending and where another branch of the case had already been decided. The Fifth Circuit, in an order issued March 13, 1981, denied the transfer (App. A, *infra*, p. 35a).

Arkla's motion to transfer was briefed and denied without the litigants' knowledge that a Commission case could not, under the court's rules and their application by the court, obtain *en banc* consideration. Because of judge disqualification, the Fifth Circuit was unable to complete the appellate process in this case as provided by 28 U.S.C. § 46(c) and the court's rules or, as Judge Clark suggests (App. A, *infra*, p. 33a), in any Gas Panel Case. These extraordinary circumstances have made consistent application of all the rules of

judicial procedure impossible. Judge Clark in his dissent (App. A, *infra*, p. 33a) suggested that resort to this Court's supervisory power may be the only recourse.

Arkla submits that the importance of the *en banc* rehearing is sufficient to justify consideration of some alternative to permit consideration and review of the intercircuit and intracircuit conflicts present in this case.

CONCLUSION

For the reasons stated, a writ of *certiorari* should be granted in this case to review the judgment rendered on November 26, 1982 by the United States Court of Appeals for the Fifth Circuit; and that judgment should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

November 26, 1982

No. 81-4011.

Frank J. HALL, *et al.*, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Natural gas producers petitioned for review of an order of the Federal Energy Regulatory Commission denying their application for a waiver of the filing requirements of the Natural Gas Act. The Court of Appeals, Garza, Circuit Judge, held that Federal Energy Regulatory Commission abused its discretion in denying natural gas producers' application for a waiver and corresponding rate adjustment.

Reversed and remanded with instruction.

Clark, Chief Judge, filed dissenting opinion.

Petition for Review of an Order of the Federal Energy Regulatory Commission

Before CLARK, Chief Judge, GARZA and JOHNSON, Circuit Judges.

GARZA, Circuit Judge:

This case presents for review an order of the Federal Energy Regulatory Commission[1] (FERC) denying the application

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[1] The Federal Energy Regulatory Commission assumed most of the duties of the Federal Power Commission on October 1, 1977. In this opinion, the term "Commission" refers to either FERC or its predecessor agency, whichever was active during the time period referenced.

of appellants, the Hall group (Hall), for a waiver of the notice requirements contained in § 4(d) of the Natural Gas Act[2] so as to permit the Hall group to collect from intervenor, Arkansas Louisiana Gas Company (Arkla), the difference between the purchased gas rate which the Hall group charged Arkla from September, 1961, to October, 1972, and the rate which Arkla paid the United States in royalties for gas obtained on leases during the same period. The instant action is but apart of a complex series of actions[3] in which Hall has attempted to enforce its contractual rights against Arkla as set forth in a 1952 contact. After eight years of contractual litigation in the Commission, the Louisiana state courts and the Supreme Court of the United States, it appears that Hall's only avenue for relief with respect to the time period between 1961 and 1972 is through the administrative provisions of the Natural Gas Act. Such relief was denied by the Commission and those orders are now presented to us for review. Because of the complexity of this case and its unusual posture before us, we set forth the facts and procedural background in detail.

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[2] NGA § 4(d), 15 U.S.C. § 717c(d), provides:

> Unless the Commission otherwise orders, no change shall be made by any natural gas company in any such rate, charge, classification or service, or in any rule, regulation or contract relating thereto, except after thirty days' notice to the Commission and to the public . . . . The Commission *for good cause shown*, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

[3] By this Court's count, the present action represents the sixteenth time a court or agency has either affirmatively ruled on an issue in this case or has declined to review thereby affirming the lower court. *See* Appendix A, *infra*.

Background[4]

Appellants, the Hall group, are producers of natural gas; Arkla is a customer who purchases their gas. In 1952, Hall and Arkla entered into a contract under which Hall agreed to sell Arkla natural gas from the Sligo Gas Field in Louisiana. The contract contained a fixed price schedule and a "favored nations clause." The favored nations clause provided that if Arkla purchased Sligo Field natural gas from another party at a rate higher than the one they were paying Hall, then Hall would be entitled to a higher price for their sales to Arkla.[5] In 1954, Hall obtained a certificate from the Commission to sell the gas under this contract. Pursuant to the relevant provisions of the NGA, Hall filed the contract containing the scheduled increases and the favored nations clause as its rate schedule with the Commission. In September, 1961, Arkla purchased certain leases in the Sligo Field from the United States and began producing gas on its leasehold. Arkla's payments to the United States for gas and liquids produced from that leasehold were higher than Arkla's payment to Hall under the 1952 contract. Prior to entering into this agreement, Arkla sought a legal opinion from its attorneys as to whether a favored nations clause would be triggered by its contract with the United

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[4] The facts at issue in this litigation have been largely decided in the contractual action between Hall and Arkla in the Louisiana state courts and in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). Our restatement reflects these findings.

[5] The favored nations clause provided:

> If at any time during the term of this agreement buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract.

States. Content that such escalation clauses were not triggered, Arkla made no effort to inform Hall about its payments to the United States.

The Hall-Arkla Contractual Litigation

In 1974, Hall discovered the higher payments which the United States was receiving from Arkla as royalties for the gas produced from the Sligo Field contract. Hall instituted suit in the Louisiana state courts seeking damages for Arkla's asserted breach of contract amounting to the difference between the prices which Arkla paid the United States and those which it paid Hall. The state trial court found that Arkla's payment had triggered the favored nations clause, but held that the filed rate doctrine[6] precluded an award of contractual damages for the period prior to 1972. The court entered an award of damages for the post-1972 period during which appellants were "small producers" and, therefore, not bound by the filing requirement of the NGA. The Louisiana Court of Appeals affirmed the trial court with modifications, *Hall* v. *Arkansas Louisiana Gas Co.*, 359 So.2d 255 (La.Ct.App.1978), and both parties appealed. The Louisiana Supreme Court denied Arkla's petition for review, *Hall* v. *Arkansas Louisiana Gas Co.*, 362 So.2d 1120 (La.1978), and certiorari was denied by the United States Supreme Court on the question of whether the interpretation of the favored nations clause should have been referred to the Commission. *Arkansas Louisiana Gas Co.* v. *Hall*, 444 U.S. 878, 100 S.Ct. 166, 62 L.Ed.2d 108 (1980) (Docket No. 78-796).

The Louisiana Supreme Court, however, did agree to review the lower court's findings with respect to the contractual damages sought by Hall for the 1961-72 period. The court

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[6] The filed rate doctrine "forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory agency." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 2930, 69 L.Ed.2d 856 (1981).

reversed the Louisiana lower court's holding that the filed rate doctrine barred Hall's contractual right to relief for Arkla's breach.[7] *Hall* v. *Arkansas Louisiana Gas Co.*, 368 So.2d 984 (La.1979). The United States Supreme Court granted Arkla's petition for a writ of certiorari and reversed the Louisiana Supreme Court. The Court held that Hall's action seeking contractual damages was barred by the filed rate doctrine. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981) (hereinafter, *Arkla* v. *Hall*).

The Primary Jurisdiction Action Before The Commission

After Hall initially filed suit in the Louisiana state court, Arkla petitioned the Commission for a declaratory order requesting them to take exclusive jurisdiction and declare that Arkla's royalty payments to the United States did not trigger the favored nations clause of the 1952 contract with Hall. The Commission declined, however, to exercise primary jurisdiction stating in three successive and "clarifying" opinions[8] that it would adhere to its policy against assuming jurisdiction over matters pending before a court. Arkla sought review of the Commission's orders in the United States Court of Appeals for the District of Columbia who, upon request of the Commission, remanded the administrative record to the agency for further

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[7] In accordance with its opinion, the Louisiana Supreme Court remanded the measure of damages question to the state district court to enter judgment. The state court entered such judgment, and Arkla appealed its determination through the state system and ultimately to the United States Supreme Court in Docket No. 79-1896. After the Supreme Court reversed the Louisiana Supreme Court in *Arkla* v. *Hall*, Docket No. 78-1789, it remanded No. 79-1896 for action consistent with its opinion. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 917, 101 S.Ct. 3152, 69 L.Ed.2d 999 (1981).

[8] *See Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI 76-28, Order Denying Petition (March 8, 1976); Order Denying Application for Rehearing (June 4, 1976); Order Clarifying Commission Order Denying Rehearing (November 11, 1976).

consideration on May 25, 1978. FERC subsequently declined to exercise primary jurisdiction in an order issued May 18, 1979. The agency ultimately decided that the interpretation of the favored nations clause presented no issue upon which the Commission had particular expertise. *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI 76-28, Order Declining Jurisdiction (May 18, 1979) at 6-7. Arkla again petitioned the D.C. Circuit for review during which time the United States Supreme Court decided the contractual action against Hall in Docket No. 78-1789. On motion of [intervenor] Hall, the D.C. Circuit dismissed Arkla's appeal on the issue of primary jurisdiction without opinion.[9]

Hall's Application For A Waiver

The present action arose as a corollary to the contract action. Following the Louisiana Supreme Court's decision that Hall was entitled to contractual damages, notwithstanding the filed rate doctrine, for the period between September, 1961 and October, 1972, the Commission informed Hall that in order to collect such damages, they would have to apply for a formal waiver of the notice filing requirements of NGA § 4(d). Hall filed its application conditionally asserting that a waiver of notice requirements was not necessary since § 4(d) did not apply to a judicial award of damages. Alternatively, they argued that "good cause" existed justifying the grant of the waiver.

The Commission denied Hall's request asserting four bases for its decision. *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI 76-28, Order Denying Application for Waiver (November 5, 1980). First, the Commission contended that a grant of

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[9] The court declined to dismiss a corollary issue which Arkla had continuously raised in the administrative proceedings concerning the "small producer" status of the Hall group. That case has now been affirmed in an unpublished memorandum opinion issued May 28, 1982. *See also Arkansas Louisiana Gas Co.* v. *FERC*, 679 F.2d 260 (D.C. Cir. 1982) (affirmance reported without opinion).

waiver would violate its "long-established 'statutory bias' against retroactive rate increases." *Id.* at 10. Second, the Commission believed that the granting of Hall's request would expose present consumers to a potential liability for higher rates which should have been collected beginning in 1961. *Id.* Third, the Commission uttered its concern about "the possible unsettling effect that a waiver . . . might have on other gas purchase transactions." *Id.* Finally, FERC was "troubled by the prospect of speculating as to what the Commission would or would not have done in 1961 had it been confronted at that time with a rate increase filing by the Hall group." *Id.* at 11. Although the Commission recognized that the "equities [were] favorable to the Hall group," it concluded that in the context of its "broader regulatory responsibilities," the waiver should be denied.

Hall now appeals from that order contending that it is arbitrary and capricious, unsupported by substantial evidence in the record, contrary to precedent and the Commission's long-standing policy of protecting contractually authorized prices, and based upon speculation and conjecture on the part of the Commission. Intervenor Arkla contends that further action in this administrative proceeding is precluded by the Supreme Court's subsequent decision in *Arkla* v. *Hall*, *supra*. Arkla contends that the issues presented here were determined in the contractual litigation and are precluded from further consideration by the doctrines of res judicata and collateral estoppel.[10] It is also asserted that the present controversy is moot. The Commission contends that its decision is a proper exercise of its discretion and should, therefore, be affirmed. In the context of our opinion below, we dispose of each of these contentions.

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[10] Arkla moved to dismiss this action on September 21, 1981. After the parties briefed the issue, this court denied Arkla's motion by order entered November 16, 1981, but agreed to carry the motion with the case.

The Vitality Of The § 4 Proceeding

We turn first to Arkla's motion to dismiss this review proceeding. Arkla asserts that the Hall group's attempt to obtain a waiver of the NGA filing requirements and a corresponding rate adjustment from the Commission is an attempt to relitigate their action for contractual damages which the Supreme Court held was barred under the filed rate doctrine. Arkla, however, misreads and construes too broadly the Supreme Court's decision in *Arkla* v. *Hall*, *supra*. In *Arkla* v. *Hall*, the Supreme Court did not hold, as Arkla contends, that the filed rate doctrine barred a grant to Hall of a waiver of the § 4 notice filing requirements and subsequent collection of rates; rather, the Court found that the filed rate doctrine barred Hall's claim for *contractual damages* (amounting to a retroactive rate increase). The Court stated that Hall could not obtain in a civil action for breach of contract what the Commission could not "*impose*" itself. *Arkla* v. *Hall*, 453 U.S. at 578 & n. 8, 101 S.Ct. at 2953 (emphasis in original). In the same statement, however, the Court clearly recognized the waiver provisions of § 4(d) and the power of the Commission to "waive the usual requirement of timely filing of an alteration in a rate." *Id.* Additionally, the Court expressly recognized that review of the Commission's November 5 Order denying waiver was pending before the United States Court of Appeals [for the Fifth Circuit].[11] *Id.*, n. 6. If indeed, *Arkla* v. *Hall* precluded further consideration of the waiver application, then there would have been no need for the Court to acknowledge the current proceedings. It would have been appropriate instead to recognize the mootness of the proceedings.

The Supreme Court's opinion is further instructive with respect to this question. We note that the Court specifically acknowledged the preemptive authority which FERC holds in

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[11] The Court's opinion mistakenly cites to the order as pending before the District of Columbia Circuit. The Commission, however, subsequently notified the Court of the pendency of those proceedings in this Circuit.

rate cases. *Id.* at 577-78, 101 S.Ct. at 2930-31. Furthermore, citing to § 4(d) of the NGA, the Court went on to state, "*Except when the Commission permits a waiver*, no regulated seller of natural gas may collect a rate other than the one filed with the Commission." *Id.* (emphasis added). This statement clearly evidences the Supreme Court's recognition of the vitality of the proceeding before us. *Arkla* v. *Hall* does not, as intervenor asserts, expressly foreclose the current administrative action.

Arkla also asserts that the issue before us—whether the Commission erred in denying Hall's request for waiver under § 4(d)—is moot since each of the reasons cited by the Commission for denying the waiver were expressly approved by the Supreme Court in its opinion. Again, Arkla overreads the high Court's decision. While the Supreme Court acknowledged the reasons set forth by the Commission in its November 5, 1980 Order denying Hall's waiver, it did not address the merits of the Commission's reasoning in the context of Hall's application for a waiver nor was that issue before the Supreme Court or determinative of the issue before it. Indeed, most of the Court's discussion of FERC's November 5, 1980 Order was merely in reference to what actions the Commission had taken, not whether such actions supported denial of Hall's application.[12] The thrust of Arkla's motion to dismiss is based upon its

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[12] For example, the Court expressly disapproved of the Louisiana Supreme Court's assumption that the higher rates sought by Hall would have been found reasonable by the Commission. In so doing, the Court stated, "[F]ar from approving the rate here in issue, the Commission has expressly declined to speculate on what its predecessor might have done." 453 U.S. at 581, 101 S.Ct. at 2932. Clearly, this statement does not evidence the Court's belief that the above reason supported the denial of Hall's waiver application; rather, it is acknowledged to support the Court's finding that the Louisiana Supreme Court improperly attempted (by assumption) to perform a duty expressly reserved to the Commission—the determination of the reasonableness of rates.

In another instance, the Court stated:

> In asserting that the filed rate doctrine has no application here, [the Hall Group] contend[s] first that the state court has done no

erroneous and overbroad reading of the Supreme Court's decision in *Arkla* v. *Hall*, and accordingly, it is without merit.

There are still other reasons to deny Arkla's motion. Principles of *res judicata* bar relitigation of the same cause of action between identical parties in which a valid final judgment has been rendered on the merits. *See Judgments and Orders*, Federal Procedure, L.Ed. § 51:189 (Interim Binder 1982).

> more than determine the damages they have suffered as a result of Arkla's breach of the contract. No federal interests, they maintain, are affected by the state court's action. But the Commission itself has found that permitting this damages award could have an 'unsettling effect . . . on other gas purchase transactions' and would have a 'potential for disruption of natural gas markets.'

453 U.S. at 579, 101 S.Ct. at 2931. Again, the Court's statement only recognizes, without express approval or disapproval, the actions previously taken by the Commission in a separate, but related, administrative proceeding.

On still another occasion, the Court made the following statement in a footnote which bears upon the Commission's concern that current ratepayers might potentially bear the burden of rates attributable to prior customers:

> Apparently in an effort to challenge this determination, respondents assert that the damages would be paid entirely from Arkla's corporate assets and would not be passed on to consumers. We see no reason why this fact, even if true, would alter our analysis. In any case, the record does not support respondents' assertion that Arkla could not pass the damages award along to its customers. In its order denying respondents' request for a waiver of the § 4(d) notice requirement, the Commission conceded that Arkla would have the right to do so, even though all the natural gas for which Arkla would be paying was long since sold.

453 U.S. at 579 n. 10, 101 S.Ct. at 2931. No one, however, challenges Arkla's right to seek a rate increase to account for any additional rate payments it might have to make to Hall. The Court's statement does not suggest whether the Commission would have to grant such a rate increase, nor does it intimate what weight this factor should carry in consideration of Hall's application for waiver.

Similarly, collateral estoppel precludes relitigation of identical issues previously decided in an action. *Id.* § 51:214. The state court action involved a dispute on a contractual claim between Hall and Arkla. The present action involves an administrative claim under the Natural Gas Act between Hall and the Commission. The waiver issue was not and could not have been litigated in the state court action. Accordingly, these principles do not support Arkla's assertion that the present action is barred.

We do, however, note the unusual posture in which this case is presented to this court. When Hall originally filed its application for a waiver, the Commission believed that the waiver was "technically" necessary so that Hall's recovery of contractual damages (which at the time had been authorized by the Louisiana Supreme Court) would not contravene the notice filing requirements of the NGA. *See, Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI 76-28 (May 18, 1979 Order). After the Supreme Court's decision in *Arkla* v. *Hall*, *supra*, this proceeding took on a very different outlook. What was previously considered a technical requirement suddenly became the only method—an administrative one—for Hall to recover its contractually authorized rates.

This case was in some respects mooted by the Supreme Court's prior opinion. Since it was originally filed so that Hall could comply with what FERC believed to be the technical requirements of the NGA before petitioners could recover contractual damages in the state court action, the Supreme Court's decision that Hall could not recover contractual damages negated the need for this court to rule on the propriety of the Commission's denial of the "technical" waiver. If Hall could not recover contractually, it did not need to technically comply with the NGA.

There is, however, an administrative component to this case which we believe remains alive. Although Hall is not entitled to *contractual damages* by virtue of the filed rate doctrine, it is entitled to the *rates* which it contracted with Arkla to receive

over which the Commission has authority to regulate. The only reason Hall has not received these rates is that it failed to administratively file for them with the Commission because Arkla did not inform them of the higher payments it was making to the United States. Section 4(d) permits the Commission, for good cause shown, to waive the notice of filing requirement. Since the Supreme Court has foreclosed the civil action remedy, it thus appears that the only avenue of relief available to Hall, if any exists at all, is the administrative one arguably provided by § 4(d).

The Propriety Of The Commission's Orders

We turn, therefore, to the orders presented for review to determine if the Commission erred in denying the application of Hall for a waiver of the notice requirements contained in NGA § 4(d). In reviewing Commission orders granting or denying waivers of rules or regulations, we have deferred to the Commission when its decision did not represent an abuse of discretion. *See, e.g., Columbia Gas Transmission Co.* v. *Allied Chemical Corp.*, 652 F.2d 503, 520 n. 16 (5th Cir.1981); *Columbia Gas Development Co.* v. *FERC*, 651 F.2d 1146, 1160 n. 18 (5th Cir.1981). A Commission order denying a waiver of statutory requirements is similarly entitled to affirmance if there exists a rational basis for the Commission's decision, and it is supported by "substantial evidence." *Id.; see City of Piqua, Ohio* v. *FERC*, 610 F.2d 950, 955 (D.C.Cir.1979). It is necessary then to examine the record and applicable law to determine if the four reasons set forth by the Commission in its order support its denial of Hall's application for a waiver. We find that the record does not support the Commission's order.

(1) Retroactive Ratemaking

The first reasons set forth by the Commission justifying its denial of Hall's application for a § 4(d) waiver was its "long-established 'statutory bias' against retroactive rate increases." As support for its position, the Commission cited to this court's decision in *Gillring* v. *FERC*, 566 F.2d 1323, 1325 (5th Cir.),

cert. denied, 439 U.S. 823, 99 S.Ct. 91, 58 L.Ed.2d 115 (1978). However, neither *Gillring* nor the Commission's policy against retroactive ratemaking are applicable to the facts of this case.

In *Gillring*, the petitioner sought a retroactive increase in the rates it had on file with the Commission during one time period so that it could offset the amount obtained in that increase against amounts the Commission had ordered Gillring to refund for a different period in which the company's rates had exceeded area rate ceilings. Gillring sought to obtain a rate increase up to the Commission's ceiling to be applicable to a time period in which Gillring had filed and collected a lower rate in accordance with the gas purchase contract it had filed as a rate schedule. There was no question in *Gillring* that when it filed its schedule, it intended and had contracted to obtain a designated rate. Subsequently, the company sought a rate higher than that ever filed with the Commission or contemplated by the rate schedule/contract. A purer example of an action for a retroactive rate increase would be difficult to imagine; a waiver of § 4(d) notice filing requirements was neither involved nor applicable in *Gillring*.

The question in the present case—whether the grant of a waiver to permit parties to effectuate their contractual agreement violates a policy against retroactive ratemaking—was squarely presented to the United States Court of Appeals for the District of Columbia Circuit in *City of Piqua, Ohio* v. *FERC*, 610 F.2d 950 (D.C.Cir.1979).[13]

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[13] While the facts of *Piqua* are not totally analogous to this case, we do not find the distinctions significant for purposes of our analysis here. *Piqua* involved application of the waiver provisions of the Federal Power Act, 16 U.S.C. § 824d(d) (1976). It is well settled, however, that the relevant provisions of the Federal Power Act and Natural Gas Act "are in all material respects substantially identical." *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353, 76 S.Ct. 368, 100 L.Ed. 388 (1956); *Accord, Arkla* v. *Hall*, 453 U.S. at 577 n. 7, 101 S.Ct. at 2930. In *Piqua*, the waiver granted was for a time period less than one year as opposed to the twenty-year period presented in this

In *Piqua*, the D.C. Circuit was presented with a case in which FERC had granted a waiver of the analogous statutory notice filing requirements of the Federal Power Act. The city challenged FERC's grant of the waiver and assignment of a retroactive date to the rate increases on the grounds that the grant was: (1) unauthorized by statute; (2) prohibited by the policy against retroactive ratemaking; and (3) unsupported by substantial evidence. The court affirmed on all three grounds. Having found that the Commission was statutorily authorized to allow rates to take effect without requiring advance notice, the court reasoned that it would not constitute retroactive ratemaking, when good cause was shown, for the Commission to give effect to the intent of the parties whose contractually authorized rate schedules called for a rate increase to be effective at a designated time. The court stated:

> In this case, two parties agreed on new rate schedules and on the effective date for the new contract. *The negotiated rate change was not retroactive; it was prospective from the date of the contract.* Filing under section 205(d) allowed the Commission to review the agreement to ensure its reasonableness. Such review does not, when good cause is shown, however, preclude enforcing the contract provision as of the date specified therein. Moreover, the Commission, in finding the Agreement reasonable, *did not retroactively substitute a rate;* it merely approved the rate change and effective date agreed upon by the parties.

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case. We discuss the relevancy of the twenty-year delay subsequently; however, we note that the interval for which a waiver is sought does not affect the question of whether the grant of such waiver violates a policy against retroactive rate increases. Finally, we find no significance in the fact that the parties in *Piqua* had agreed on new rate schedules and a new effective date for the new contract and the present situation where the parties provided in the original contract for new rates to take effect upon a date triggered by a specified transaction (i.e., the payment by Arkla of higher prices for gas to another party). In both cases, the intentions of the parties were the same: the effectuation of new rates to be charged prospectively from a date ascertainable in the contract.

610 F.2d at 954-55 (emphasis added). A similar position was espoused by FERC in the administrative proceeding in which it had granted the waiver. *See, Dayton Power & Light Co.*, Docket No. ER77-546, Order Granting Rehearing and Correcting Prior Order (January 18, 1978); Order Denying Rehearing (April 3, 1978).

The facts of this case have been established by prior litigation in this dispute. Those facts establish that the 1952 contract between Hall and Arkla contained an escalation clause providing for the effectuation of an increase in rates should Arkla pay an amount higher than those rates it submitted to Hall. It is now also established that the parties intended the favored nations clause in their contract to cover the present situation thereby permitting the Hall group (had they filed) to recover from Arkla the equivalent[14] of the rates it paid the United States beginning in September, 1961. We agree with the D.C. Circuit Court that the policy against retroactive ratemaking which precludes Commission "substitution of an unreasonably high or low rate with a just and reasonable rate" is "immediately distinguishable" from the present situation where the Commission's waiver gives prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract. The Commission erred in not giving effect to this policy which it had previously distinguished and espoused.

(2) Exposure Of Present Consumers To Liability

The second and perhaps most compelling reason set forth by the Commission justifying its denial of the § 4(d) waiver was its concern that 1980 consumers might be exposed to liability for rates attributable to 1961 consumers. The clear import of this reasoning is that a different group of consumers will pay for the

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[14] We use the term "equivalent" assuming for present purposes that the rate sought by Hall would be just and reasonable. We discuss this issue in more detail; *infra*.

gas than the one which used it. While the proposition is a logical one, we note that there is little evidence in the record to suggest that Arkla's 1961-72 customers are in fact different from its 1980 customers.[15] To the extent that the record is devoid of information in this regard, the Commission's reasoning lacks a firm basis of support.

It is also to be noted, however, that the Commission's reasoning admits that its concern is merely one of *potential* liability to the consumer. It is far from clear that Arkla would be entitled to pass along to its customers an amount representing its delayed payment for purchased gas when the delay, particularly the length of the delay, was the result of Arkla's own, albeit non-fraudulent, actions. Before any rate paid by Arkla to Hall could be passed on to the consumer, Arkla would have to file with the Commission a schedule and notice of rate change and bear the burden of establishing the just and reasonableness of its request. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 83 S.Ct. 211, 9 L.Ed.2d 199, (1962); Natural Gas Act § 4(e), 15 U.S.C. § 717c(e). It is well settled that the Commission's duty under the NGA statutory scheme when considering the reasonableness of rates is "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co.* v. *Public Service Commission* (CATCO), 360 U.S. 378, 388, 79 S.Ct. 1246, 1253, 3 L.Ed.2d 1312, 1319 (1959). The clear import of Supreme Court decisions, as evidenced by CATCO, is that the underlying purpose of the NGA is protection of the consumer "*even though this may result in some injustice to the producers.*" *See* Summers, Oil and Gas § 926 (1966) (emphasis added). Although it is undisputed that the cost of purchased

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[15] At oral argument, for example, Hall's counsel asserted that to the best of his information, the gas purchased from Hall was sold by Arkla to line industries in Southwest Arkansas wherein the possibility that consumers over the twenty-year period would be similar is more probable.

gas is a basic component of a regulated entity's rate structure, the Commission's duty under the Act to protect consumers together with the unusual delay attributable to Arkla's own actions present a scenario in which it is far from clear whether Arkla could justify its requested rate increase. *CATCO* teaches that as between Arkla and its customers, the Commission has a duty to protect the consumer even if such results in some "injustice" to, in this case, Arkla.[16]

We do not make these observations to foreclose FERC's consideration of a potential rate increase application by Arkla, but only to emphasize that the reason proffered by the Commission as to the "potential" liability of present consumers is very much a speculative proposition at this point in time. This reason, by itself, does not support the Commission's denial of

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[16] There are other considerations which weigh against the conclusion that Arkla would be entitled to pass on to its consumers a rate increase resulting from increased payments to Hall. As between Hall and Arkla, the Commission has admitted that the equities favor the Hall group. The NGA was drafted to encourage and protect the right of parties to establish rates by individual contract. The Act "evinces no purpose to abrogate private rate contracts as such." *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 338, 76 S.Ct. 373, 378, 100 L.Ed. 373 (1956). In granting Hall's waiver, the Commission could promote the purposes of the Act and preclude Arkla from breaching its contract by delaying Hall's notice filing and using the length of delay to defeat Hall's application. On the other hand, if the Commission took this course but felt compelled to grant a rate increase to Arkla, it would neglect in some respects its duty to protect consumers. The dilemma is one which suggests that the Commission deny any subsequent application for rate increase by Arkla arising from these proceedings. In so doing, the Commission would effectuate dual purposes of the Act. Clearly, the Commission could consider these factors in ruling on whether a rate could pass on. We do not intimate that this is the course which the Commission should take; we only use this as an illustration of the uncertainty of the Commission's reliance on potential liability to the consumer as a reason for denying Hall's application.

Hall's waiver.[17] We, therefore, examine the remaining reasons proffered by the Commission in determining whether it has abused its discretion.

(3) Unsettling Effect On Other Contract Purchases

The third reason cited by the Commission for denying Hall's application was "the possible unsettling effect that a waiver in this case might have on other gas purchase transactions." The Commission found that if Hall were granted a higher rate for its gas, a strong likelihood existed that other claims would arise asserting that this increase triggered the operation of indefinite price escalator provisions in other contracts in the Sligo Field geographical area. Hall contends that this assertion is speculation and conjecture on the part of the Commission about unidentified pipeline companies and that there is no substantial evidence to support this reasoning in the record of the subject proceeding.

It is true that most of the arguments in brief to this court with respect to this issue were drawn from information outside the administrative record. It is conceded that the Commission may draw from its own knowledge and expertise, as well as its own records, information upon which to support this conclusion. Our review of such information does not, however, support the Commission's concern that numerous transactions would be affected.

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[17] The authority of the Commission to deny any request by Arkla for a rate increase was expressly recognized by Justice Stevens in his dissent in *Arkla* v. *Hall*, *supra*,

> The short answer to the first concern [that the burden of the award might be passed on to consumers] is that there is no more reason to assume that this award will justify an increase in utility rates than any other damages judgment that a public utility may be required to pay; if the regulatory concern is valid, the agency having jurisdiction over Arkla's sales has ample authority to require its stockholders rather than its customers to bear this additional cost.

453 U.S. at 607, 101 S.Ct. at 2945-46.

The Commission's reasoning is additionally flawed by the unique posture of this case. In this action, the Louisiana courts determined the effect of the royalty payments on the most favored nations provision with the approval of Hall and the sanction of the Commission. On two occasions, the Commission declined to exercise primary jurisdiction[18] and decide the issue for itself. The determination of the Louisiana courts, however, is clearly precedential only in the present action involving Hall and Arkla. Several factors compel this conclusion.

First, the Supreme Court has ruled that the only avenue available to Hall to obtain the rates for which it contracted is for the Commission to grant a waiver to permit the rate schedule to take effect. This procedure, therefore, is the only method available to other parties who might be entitled to similar relief. Unlike the present action, however, other parties would not be entitled to rely upon the Louisiana courts' interpretation of the 1952 contract/rate schedule at issue presently. Those decisions simply have no res judicata or collateral estoppel effect in a different administrative proceeding between different parties.

If an issue similar to the present one were ever addressed to the Commission again, the agency would have to decide it rather than defer to a state court as occurred in this case. The Commission has previously considered many factors which effectuate the "triggering" of a most favored nations clause, *see Shell Oil Co.*, Opinion No. 382, 29 F.P.C. 498, 499 (*affirmed Shell Oil Co.* v. *FPC*, 334 F.2d 1002 (3d Cir. 1963)), and as the Commission notes in brief, such factors do not suggest that, if the Commission was deciding, a royalty payment such as the present one would necessarily trigger operation of a most favored nations clause. The Commission, in fact, has expressly recognized that varying interpretations to favored nations clauses result in differing outcomes. In its May 18, 1979 Order

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[18] *See* Appendix A, Chronology of Agency/Court Action on Primary Jurisdiction Issue, *infra*.

declining to exercise primary jurisdiction in this very action, FERC argued:

> Since the meaning of a favored nation clause depends upon the intentions of the parties to the contract, we see no need for uniform interpretation of all favored nation clauses. Indeed, uniform interpretation would seem to be impossible.[19]

There is little support then in the record for the Commission's conclusion that the granting of Hall's waiver would have an "unsettling effect" on other gas purchase contracts. Indeed, the applicable law leads to a conclusion quite the contrary.

Finally, we acknowledge the reasoning of Justice Stevens in dissent in *Arkla* v. *Hall* who addressed the merits of the very concern set forth by the Commission:

> The second concern [that other claims might arise] seems exaggerated because it applies only to contracts executed before 1961, . . . and it seems unlikely that many large purchasers of natural gas could successfully have concealed violations of escalation clauses from their suppliers. To the extent that this case does have counterparts in such contracts, however, it seems to me that those cases should be decided in the same way.

453 U.S. 607-08, 101 S.Ct. at 2946. In summary, we find no record support, legal support, or for that matter, practical support for the Commission's conclusion that other gas purchase transactions would be affected.

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[19] *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI 76-28, Order Declining Jurisdiction (May 18, 1979) at 8.

Citing to the above administrative case, this court similarly recognized the less-than-absolute meaning and effect that an interpretation of a favored nations clause in one case would have on others in general. In *Pennzoil Company* v. *FERC*, 645 F.2d 360, 386 (5th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982), we stated:

> Since the escalation clause's meaning depends on the contracting parties' intentions, which in turn depends on the circumstances of its execution, identical language in different contracts could be interpreted to have different meanings . . . .

(4) Speculation About 1961 Commission

The final reason set forth by the Commission to justify its decision was its reluctance to speculate as to what the Commission would have done if confronted in 1961 with a Hall request for enforcement of its most favored nations clause. The fact is that FERC wholly ignores or refuses to recognize exactly what the 1961 Commission decided when faced with an identical question. In *The Pure Oil Company*, 25 F.P.C. 383 (1961), the Commission concluded that although favored nations clauses would be prohibited in the future, it would not eliminate such provisions from previously executed contracts. *Id.* at 388-89; Order No. 232, 25 F.P.C. 379 (1961). Speculation as to what the 1961 Commission would have done, therefore, was wholly unnecessary. FERC's attempts at distinguishing *The Pure Oil Company* are futile and without merit. Indeed, the Commission today concedes the legality of the 1952 contract when it acknowledges Hall's right to contractual damages following 1972. *See, Hall* v. *Arkla*, 453 U.S. at 606-07, 101 S.Ct. at 2945 (Stevens, J. dissenting).

We note that, even if some ambiguity as to what the 1961 Commission would have done existed, FERC has previously speculated over long time periods about what a prior Commission would have done. *See, e.g., Plaquemines Oil and Gas Company*, Opinion No. 572-A (April 29, 1970) (1970 Commission found that 1961 Commission likely would have found rates acceptable).

Finally, FERC's argument that the 1961 Commission very likely would have looked with disfavor on a Hall filing and found no triggering of the escalation clause is not compelling. Twice, FERC was asked to decide the issue and declined thereby permitting the state court to consider it. It seems particularly arbitrary that the Commission could (1) decline to exercise primary jurisdiction over an issue, deferring to a state court's power to interpret the contractual provision, (2) take issue with the state court's determination contrary to what the Commission "may" have found, and then (3) use the excuse

that they are unable to determine what a prior Commission would have done to deny Hall's waiver in the related administrative proceeding.

In conclusion, we find that the only reason set forth by the Commission which even arguably suppports the denial of Hall's application for a § 4(d) waiver is the concern that present consumers might potentially be subjected to liability for prior rates if Arkla were permitted to pass on such rates. As previously noted, this concern is highly speculative at this time and an impressive argument exists supporting the conclusion that Arkla would not be permitted such a rate increase. Potential liability to consumers, by itself, simply does not support the Commission's decision to deny Hall's waiver request, particularly when the equities of this action weigh more in favor of Hall than Arkla. We find that the Commission abused its discretion in denying Hall's application for a waiver.

Relief

Our decision that the Commission erred in failing to grant Hall's requested waiver does not end the proceeding before us. On brief, Hall requests only that the Commission's orders be reversed. As part of its rather convoluted argument, however, Hall contends that the rates which it seeks to obtain (which it asserts are equivalent in amount to the contractual damages sought in the state court action) have been found by the Commission to be below just and reasonable area rates in effect for the time period involved. Accordingly, the question arises as to whether this court can remand this case to the agency to permit Hall to collect the rates which it seeks without allowing further action by the Commission. We believe there are several reasons to decline from so acting, and accordingly, we remand this proceeding to the Commission to determine the just and reasonableness of the rates sought by Hall.

First, it is to be noted that in the latter part of the state court action, the Commission reversed itself and declined to speculate on the reasonableness of the rate schedule submitted by

Hall. Hall asserts, however, that the Commission is bound by earlier admissions in this action.

On several occasions, the Commission has stated that the contractually authorized prices sought by Hall were within the applicable just and reasonable area rates. Its first statement to this effect came in its May 18, 1979 Order declining to exercise primary jurisdiction over the contractual action. In its order, the Commission discussed the impact of the contractual damage action on its regulatory responsibilities. In finding such impact to be minimal, the Commission stated, "on the facts of this case, the damages do not exceed the applicable area rate ceilings" and "the rates requested are within what the Commission had determined to be the zone of reasonableness."[20]

The Commission again acknowledged the reasonableness of the rates sought by Hall in its brief as *Amici Curiae* to the United States Supreme Court in Docket No. 78-986. In that action Arkla sought review of the question of whether the interpretation of the most favored nations clause in the 1952 contract should have been referred to the Commission. In its brief, FERC contended that Hall sought only to recover from Arkla damages which did not exceed Commission applicable area rate ceilings.

Finally, the Commission again recognized the reasonableness of the rates sought by Hall in its original order before us on review. In footnote 4 of its November 5 Order, the Commission stated,

> The rates (11.7432 cents per Mcf to 14.0508 cents per Mcf) would, however, be within the Commission ceilings in effect during that time.

The following day, FERC issued an "Errata Notice" deleting the text of footnote 4 from its opinion. In its Order Denying Rehearing issued January 2, 1981, the Commission explaind

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[20] *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI 76-28, Order Declining Jurisdiction (May 18, 1979) at 10.

that "the deleted footnote was not a necessary part of the Commission's decision" and that its inclusion "was an inadvertent printing error." While the latter explanation is questionable, we note that the deleted footnote is clearly not binding on the Commission.

The Commission now asserts that it has reconsidered its prior determinations which were based on erroneous interpretations of the 1952 contract and has concluded that the Hall rates are not so clearly within the maximum, lawful area rates. The Commission first indicated its reconsideration of this question in its brief filed in November, 1980, as *Amici Curiae* to the Supreme Court in Docket No. 79-1896. That case was the appeal from the Louisiana state court system awarding contractual damages to Hall consistent with the Lousiana Supreme Court decision in *Hall* v. *Arkansas Louisiana Gas Co.*, 368 So.2d 984 (La.1979) (reversed subsequently in *Arkla* v. *Hall*, *supra*, Docket No. 78-1789). Arkla sought review of the Louisiana Court of Appeals' ruling that the contractual damages awarded (for both the pre- and post-1972 periods) to Hall exceeded Commission ceilings. In its brief the Commission explained the reasons for its reversal:

> The decision of the Louisiana Court of Appeal rejecting Arkla's contention is based in part on the Commission's conclusion, in its order refusing to exercise primary jurisdiction, that "the damages do not exceed applicable area ceiling rates." Upon careful reexamination of the information available to it, the Commission has determined that its earlier conclusion was based on an incorrect understanding of the contract between Arkla and respondents that is involved in this case. At the present time the Commission is unable to determine conclusively whether its ceiling rates have been exceeded as a result of the damages awarded to respondents.
>
> * * *
>
> The Commission's previous conclusion that "the damages does not exceed applicable area ceiling rates," was premised upon the erroneous belief that Arkla's contract

> with respondents was based on sales at the plant, and not at the wellhead.[21] As a result of this incorrect interpretation, the Commission eliminated from its calculations those damages that apparently represented payment for removable liquids, and found that the damages awarded for the actual gas (*i.e.*, residue gas) were within the area ceiling rates. That premise is now undermined by the ruling of the Louisiana courts . . . that Arkla's contract with respondents provided for sales of the entire gas stream at the wellhead, including removable liquids.

On the same day that the United States Supreme Court reversed the Louisiana Supreme Court in *Arkla* v. *Hall*, *supra* (Docket No. 78-1789), it granted certiorari in Docket No. 79-1896, vacated the damage computation awarded by the Louisiana Court of Appeals, and remanded the case in light of its decision in Docket No. 78-1789. *Arkla* v. *Hall*, 453 U.S. 917, 101 S.Ct. 3152, 69 L.Ed.2d 999 (1981). With respect to Hall's contention that the FERC is bound by its prior statements acknowledging the reasonableness of Hall's requested rates, the Court's decision in Docket No. 79-1896 undermines and defeats whatever weight such reasoning possessed.

Even more fundamental, however, to this court's decision to remand this case to the Commission on the question of the reasonableness of rates, is the statutory scheme of the Natural Gas Act itself. The regulation of rates for the sale of natural gas

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[21] All natural gas produced at the wellhead contains varying amounts of liquefiable hydrocarbons (LHC's) in a gaseous state. Natural gas including these LHC's is known as wet gas. At the plant, LHC's can be extracted from the wet gas and after processing can be sold as a separate product. Natural gas from which LHC's have been removed is known as dry gas. Under the contract Hall sold Arkla wet gas. The Commission's rate regulations prescribe the same maximum rate for the sale of dry and wet gas. Arkla contends that the contractual damage award granted Hall the market value of the LHC's in addition to the price of gas as though the sale only involved a plant sale of dry gas. As a result, it is asserted that the rate previously acknowledged as reasonable exceeds by almost two times the maximum rate for wet gas to which Hall is entitled.

for resale in interstate commerce by producers of natural gas was vested by Congress exclusively in the Commission under the Natural Gas Act. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 611-12, 64 S.Ct. 281, 291-92, 88 L.Ed. 333 (1944); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 65 S.Ct. 829, 89 L.Ed. 1206 (1945); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954). In the context of this administrative action, our finding that the Commission should have granted Hall's application for waiver of the notice provisions of § 4(d) does not end the Commission's duty to determine the just and reasonableness of those rates. It is, therefore, necessary that we remand this action to permit the Commission to grant Hall's waiver and to provide Hall with the opportunity to file its rates for Commission review on their reasonableness.

In so doing, we make the following observations. First, the Commission's determination of the reasonableness of Hall's rates should not be inconsistent with the computation of Hall's damage recovery for the post-1972 period, at least to the extent that these computations are analogous. Second, should the Commission find the rates requested by Hall to exceed the applicable area rate ceilings, it would appear that the Hall group would at least be entitled to the ceiling rate.

Final Considerations

Two final considerations merit attention with respect to our decision. First, unlike the situation presented in *Hall* v. *Arkla*, *supra*, in which the "filed rate" doctrine precluded the award of contractual damages amounting to a retroactive rate increase, the grant of a waiver by the Commission does no violence to the filed rate doctrine. The D.C. Circuit addressed this contention in *City of Piqua* v. *FERC*, *supra*, and we adopt their reasoning:

> "[T]he filed rate doctrine provides that a utility] can claim no rate as a legal right that is other than the filed rate . . ." This court, in discussing the doctrine, stated: "The considerations underlying the [filed rate] doctrine . . . are

> preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *City of Cleveland* v. *FPC*, 174 U.S.App.D.C. 1, 10, 525 F.2d 845, 854 (1976). This purpose is unaffected by the Commission's waiver of the notice requirement upon good cause, thus allowing rate changes, found by the Commission to be just and reasonable, to become effective on the date agreed by the parties.

610 F.2d at 955.

Second, our decision today promotes each of the policies underlying the Natural Gas Act, particularly § 4. Congress in drafting these provisions sought to preserve the integrity of private contractual arrangements. At the same time, Congress required companies to comply with its requirements of notice for a rate change so as to provide the Commission with the opportunity to review rates. In so doing, Congress expressed both "its conviction that the public interest requires the protection of consumers from excessive prices" and its "[manifest] concern for the legitimate interests of natural gas companies." *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 113, 79 S.Ct. 194, 200, 3 L.Ed.2d 153 (1958). The granting of a waiver by the Commission gives effect and preserves the integrity of the private contractual arrangement entered into by Hall and Arkla. The granting of a waiver, but only for good cause shown, gives credence to the § 4 notice filing requirements drafted by Congress. In remanding to the Commission, we acknowledge the authority of the agency to review rates so as to protect consumers from unauthorized, excessive prices. Finally, our decision recognizes the legitimate interests of the Hall group whose showing of good cause entitles them to the waiver of notice filing requirements.

REVERSED and REMANDED WITH INSTRUCTIONS.

Appendix "A"

A. Chronology of decisions on the contractual issues:

(1) *October 14, 1977*—Louisiana state court renders original opinion.

(2) *May 1, 1978*—Louisiana Court of Appeals affirms with modifications.

(3) *September 22, 1978*—Louisiana Supreme Court denies Arkla's petition on the interpretation of the favored nations clause.

(4) *March 5, 1979*—Louisiana Supreme Court reverses lower courts on damages for the 1961-72 contractual period and remands.

(5) *May 17, 1979*—On remand, Louisiana state district court enters award of damages for Hall.

(6) *October 1, 1979*—United States Supreme Court denies Arkla's petition for certiorari on interpretation of favored nations clause.

(7) *January 22, 1980*—Louisiana Court of Appeals affirms state district court entry of damages.

(8) *May 2, 1980*—Louisiana Supreme Court declines to review damages question.

(9) *July 2, 1981*—United States Supreme Court reverses Louisiana Supreme Court's ruling in (4) above.

(10) *July 2, 1981*—United States Supreme Court remands damages question in (7) above.

B. Chronology of agency/court action on primary jurisdiction issue:

(11) *March 8, June 4, November 8, 1976*—The Commission declines to grant Arkla's motion for a declaratory order.

(12) *May 25, 1978*—United States Court of Appeals for the District of Columbia Circuit remands Commission's orders at their request.

(13) *May 18, 1979*—FERC declines to exercise primary jurisdiction.

(14) *October 19, 1981*—The D.C. Circuit grants motion to dismiss appeal.

C. Chronology of present action on waiver issue:

(15) *November 5, 1980*—The Commission denies Hall's request for a waiver.

(16) Hall appeals in present action to United States Court of Appeals for the Fifth Circuit.

CLARK, Chief Judge, dissenting.

The majority assumes that the Commission, in its discretion, may and should deny Arkla the rate increase it will surely seek as a result of today's decision. I respectfully disagree. Under the due process clause no public utility may be compelled to absorb its own costs. The most basic of such costs are expenditures for gas purchases, whether incurred routinely or, as here, as the final product or protracted litigation. Because Arkla's ratepayers rather than Arkla received the benefit of its noncompliance with the "most favored nation" clause in the 1960s, it follows inevitably, in my view, that the ratepayers must bear the burden of Arkla's belated compliance now.

This conclusion alters the analysis of this dispute for me. Rather than weighing the equities between Arkla and Hall, the balance must be struck between Arkla's ratepayers and Hall. When the Commission made this inquiry, it decided that imposing the costs of compliance on today's ratepayers would be inequitable. I cannot disagree. If these ratepayers are not the same as those who should have borne the cost twenty years ago, the inequity is obvious. Even if the identity of the ratepayers has remained constant, however, the effects of a retroactive increase on the long-completed business affairs of innocent ratepayers would be equally unjust. In either case, there is sufficient evidence to support the Commission's conclusion. Therefore, without reaching the other grounds discussed by the majority, I respectfully dissent.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

March 14, 1983.

No. 81-4011.

Frank J. HALL, *et al.*, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for Review of an Order of the Federal Energy Regulatory Commission.

ON PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion November 26, 5 Cir., 1982, 691 F.2d 1184)

Before CLARK, Chief Judge, GARZA and JOHNSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED, and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Suggestions for Rehearing En Banc are DENIED.

CLARK, Chief Judge, dissenting:

For the reasons stated in my dissent to the panel opinion, I dissent from the denial of panel rehearing.

To avoid an improper implication of agreement from the failure of any member of the panel or judge in regular active

service on the court to request that the court be polled on rehearing en banc, I must note that only four members of this now thirteen active judge court could initiate or participate in such a poll. Since no senior judge is a member of the panel, none is eligible to participate in the en banc process. In any event, they would not have a vote in the en banc polling process. 28 U.S.C. § 46(c).

Nine judges in regular active service have disqualified themselves in this case. There are sound reasons for this situation. Rulings of regulatory agencies often have a pronounced ripple effect. This causes 28 U.S.C. § 455(b)(4) and Canon 3(C)(1) of the Code of Judicial Conduct for United States Judges to erect very broad barriers to a judge's participation in appeals from the Federal Energy Regulatory Commission.[1] This is intensified by the only opinion of the Advisory Committee on

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[1] 28 U.S.C. § 455. Disqualification of Justice, Judge, Magistrate or Referee in Bankruptcy.

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

. . . .

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy . . .;

. . . .

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(4) "financial interest" means ownership of a legal or equitable interest, however small, . . .;

. . . .

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).

Codes of Conduct specifically relevant to appeals from this agency.[2]

The inclusion of such appeals in the general mix of cases assigned to randomly selected panels of this court created an abnormal number of disqualifications and resulted in numerous docketing problems. In response, the court administratively created a special panel of judges whose property ownership would not regularly cause disqualification in Federal Power Commission and Federal Energy Regulatory Commission cases.[3]

This "Gas Panel" solution worked acceptably until the number of judges who were not disqualified dwindled to three. At least one judge thinks the court's consensus interpretation for participation standards in this class of cases is uniquely too narrow.[4] Even though it has recently risen to four, that num-

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[2] A paragraph of Advisory Opinion 62 reads:

> A judge who was the beneficial owner of a fractional interest in land under mineral lease to two oil companies, raised the question as to his serving on a special panel that would have cases before it, the disposition of which could result in increasing prices of oil or gas. There is presently no production from the land in which the judge has an interest, but he does share in annual lease payments. Since the outcome of the proceeding could substantially affect his beneficial interest in the leases, the Committee concluded he had a disqualifying financial interest in the subject matter in controversy (Doc. 180).

[3] Fifth Circuit Internal Operating Procedures ¶ 6(c).

[4] The Judge observes:

> When we decide a matter of corporate taxation, we potentially affect almost any corporation. When, as in this case, the panel decides—or strongly infers—that retroactive rate increases can't be passed on to consumers, that may well have as much potential economic effect on panel members (as consumers of gas) as it does on another judge whose spouse owns a little production, or as it does on a judge who owns shares in a mutual fund owning stock in a corporate party to the case before the judge, or as it does on a judge who owns a life insurance policy and sits on a diversity case in his own state construing life insurance policies.

ber seems to me to constitute an entirely unacceptable judicial base to permit this court to continue to review significant challenges to the broad-ranging and financially impactive affairs involved in many of these appeals. Litigants are entitled to the full statutory right of review, including hearing or rehearing en banc.

I hasten to acknowledge that to date no litigant has ventured a challenge to this court's competence to handle these reviews. However, this is a situation I attribute to discretion rather than valor or any extraordinary confidence in those few who have recently manned the "Gas Panel" of this court.

I feel compelled to write as I do, because the denial of rehearing could give an erroneous impression, appearing as it does to come from the measured consideration of thirteen judges when, in reality, it results from the fact that no "Gas Panel" case can ever go en banc due to disqualifications. It is also written with the hope that emphasizing the situation may assist rectification by changing the views of presently disqualifying judges or the appointing authority, or, failing in that, through the Supreme Court's supervisory power.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4011

FRANK J. HALL, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Petition For Review Of An Order Of The Federal Energy Regulatory Commission (Louisiana Case)

Before CLARK, Chief Judge, GARZA and JOHNSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the Motion of Intervenor for Relief from Order Denying En Banc Rehearing is DENIED.

U.S. COURT OF APPEALS
FILED
APR 27 1983

GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

UNIT A

No. 81-4011

FRANK J. HALL, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Petition For Review Of An Order Of The Federal Energy Regulatory Commission (Louisiana Case)

Before HENDERSON, ANDERSON and SAM D. JOHNSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the joint motion of the Federal Energy Regulatory Commission and Arkansas Louisiana Gas Company to transfer this petition for review to the United States Court of Appeals, District of Columbia Circuit, is denied.

U.S. COURT OF APPEALS
FILED
MAR 13 '81
GILBERT F. GANUCHEAU

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4011

FRANK J. HALL, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Petition For Review Of An Order Of The Federal Energy Regulatory Commission

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Before CHARLES CLARK, Chief Judge, GARZA and SAM. D. JOHNSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of Arkansas Louisiana Gas Company, Intervenor, to dismiss the petition for review is denied, but will be carried along with the case.

U.S. COURT OF APPEALS
FILED
NOV 16 1981

GILBERT F. GANUCHEAU
CLERK

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL ENERGY
REGULATORY COMMISSION

FILED RATE DOCTRINE
CONTRACT DAMAGES

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr., George R. Hall and J. David Hughes.

Docket No. RI76-28

ARKANSAS LOUISIANA GAS COMPANY

v.

FRANK J. HALL, *et al.*

ORDER DENYING APPLICATION FOR WAIVER OF FILING REQUIREMENTS

(Issued November 5, 1980)[1]

On May 24, 1979, Frank J. Hall, *et al.* (the Hall group) filed an application pursuant to Section 154.98 of the Commission's[2] Regulations requesting a waiver of the notice requirements contained in

[1] This order has been modified to reflect an *errata* notice issued November 6, 1980, correcting an order posted on November 5, 1980.

[2] The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the Federal Power Commission (FPC); when used otherwise, the reference is to the Federal Energy Regulatory Commision.

B. *Commission Proceedings*

On September 11, 1975, Arkla filed in this docket a petition for a declaratory order construing the favored nations clause. The Commission declined to resolve the contractual dispute, stating in its March 8, 1976, order that "[i]t has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court . . . ." [9] Arkla appealed this decision to the D.C. Court of Appeals,[10] and while the appeal was pending, the Commission moved for an order remanding the record for further consideration. The Commission's request was granted by the court on May 25, 1978.

On remand, the Commission, in an order issued May 18, 1979, adhered to its earlier determination to decline to exercise jurisdiction. It did so, however, for a reason different than that enunciated in the March 8, 1976, order. The Commission stated that it "believe[d] the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous." [11] Rather, the Commission stated, the decision to defer should turn on whether the Commission finds that the issue involves a matter of "primary jurisdiction." In making this determination, the Commission stated, it would look to the following three factors:

1961-1972 period. In Sup. Ct. No. 79-1896, Arkla has sought certiorari of the judgment entered by the Louisiana district court on the remand of the damages issue.

[9] *Mimeo*, at 3.

[10] *Arkansas Louisiana Gas Company* v. *FERC*, D.C. Cir. No. 77-1146.

[11] Order issued May 18, 1979, mimeo, at 6.

(1) whether the Commission possesses some special expertise which makes the case particularly appropriate for Commision decision;

(2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and

(3) whether the case is important in relation to the regulatory responsibilities of the Commission.[12]

After reviewing these three factors in the context of the instant case, the Commission concluded that the assertion of jurisdiction was unnecessary. In its discussion, however, the Commission expressed the view that the Louisiana Supreme Court's award of damages for the 1961-1972 period violated the filed rate doctrine.[13]

Thereafter, the Hall group filed its application for a waiver of the notice requirements prescribed in Section 4(d). Arkla submitted a response and protest to the application on June 8, 1979. The Hall group filed a reply to Arkla's response on June 13, 1979.

POSITIONS OF PARTIES

The Hall group filed its request conditionally, contending that a waiver of the filing requirements is not necessary since Section 4(d) has no applicability to a judicial award of damages for breach of contract. The Hall group then contends that if a waiver is required, principles of law and equity establish that a waiver is justified. The Hall group argues that the only reason that it failed to comply with the notice provisions of Section 4(d) was because Arkla

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[12] *Id.*

[13] *Id.* at 10, n. 18.

wrongfully concealed from the Hall group the royalty payments which Arkla was making to the United States.

Arkla asserts that the requirements of Sectior 4(d) apply to the court-awarded damages because such damages are merely the additional prices to be paid under the 1952 contract, as interpreted by the courts of Louisiana. Arkla further asserts that the filed rate doctrine absolutely precludes the Hall group from collecting any damages for the period prior to October, 1972. Arkla also denies any allegations of wrongdoing on its part, and argues that the Hall group is simply seeking a windfall at the expense of the consumer.

DISCUSSION

The Commission has before it two issues: (1) does Section 4(d) of the Natural Gas Act apply to the matter of damages awarded to the Hall group for the 1961-1972 period? and (2) if so, is there good cause to grant waiver of Section 4(d) in this case and, further, accept the rates filed by the Hall group. Both of these questions involve the scope of and reasons for the filed rate doctrine.

A. *Applicability of Section 4(d)*

We address first the contention of the Hall group that Section 4(d) is inapplicable here. Citing *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), *appeal dismissed* and *cert. denied*, 409 U.S. 1052 (1972) and *Cities Service Gas Company* v. *FPC*, 535 F.2d 1278 (D.C. Cir. 1976), the Hall group argues that a court award of damages for breach of contract is an entirely "separate and independent" issue from the question of rate obliga-

tions imposed by Sections 4 and 5 of the Natural Gas Act.

Section 4(d) of the Natural Gas Act provides that a natural gas company shall not change its rates without 30 days' notice to the Commission, unless the Commission shall, for good cause shown, waive this requirement. There is no question that had Arkla given the Hall group the notice of the government royalty payments that the Louisiana courts held Arkla was required by contract to give, the Hall group would have been required to comply with Sections 4 and 5 of the Natural Gas Act in seeking to charge the higher rate. The question, then, is whether consideration of the matter in the context of a state court contract action (involving rates for past sales) takes the matter outside the purview of the Natural Gas Act. The Louisiana Supreme Court held that it does. We disagree.

State courts—and Federal courts as well—may have a wide variety of actions between natural gas companies and their customers brought before them. Obviously, not all damage awards are barred by the Federal preemption and the assignment of regulatory responsibility to this Commission, but some are. To pick the two extremes, damages for an automobile accident between an Arkla vehicle and a Hall group vehicle are not barred, but an order in a state court action on a contract purporting to set the rate for prospective sales of natural gas in interstate commerce is barred. We believe that this case is merely the latter example presented in slightly different form, and that the policy considerations underlying the statutory and common law establishment of the filed rate doctrine dictate the conclusion that the Natural Gas Act applies to Louisiana's award of damages to the Hall group for the 1961-1972 period.

The filed rate doctrine has at least two aspects and policy bases, both of which are pertinent here. The first is the need for certainty as to the rates and other terms governing a regulated transaction. The Congress lodged exclusive jurisdiction in this agency to regulate sales of natural gas in interstate commerce, and provided in Section 4(c) of the Natural Gas Act that rates and charges for such sales be kept on file with this Commission. Section 4(d) provides that rates for such sales may not be changed without thirty days' notice to the Commission. These provisions have the effect of giving certainty to both buyers and sellers of natural gas in the interstate market, since only the rate filed with the Commission may be charged.

A second aspect to the filed rate doctrine is that it ensures that the rates charged for natural gas in interstate commerce are, in the words of Section 4(a) of the Natural Gas Act, "just and reasonable". As the courts have repeatedly held, the determination of a just and reasonable rate is a matter requiring expert judgment, and the statute gives the Commission "exclusive powers . . . to determine what those rates are to be." *Montana Dakota* v. *Northwestern Public Services Co.*, 341 U.S. 246, 250 (1951).

In the case before us, the effect of the Louisiana Supreme Court's holding is to permit the collection of a rate different from and higher than the rate the Hall group had on file with the Commission, and to permit the collection of this higher rate without the Commission's having determined that the different and higher rate is just and reasonable.

The Louisiana Supreme Court appears to have recognized in some respects that the award to the Hall group has the effect of increasing the rate for gas sold during the 1961-1972 period above the rate

on file during that period, but the Court applied Article 2040 of the Louisiana Civil Code to "consider fulfilled" the Section 4(c) filing requirement. 368 So. 2d at 990. But state law cannot be a legitimate basis for relieving a natural gas company of an obligation under the Natural Gas Act. What is more, the effect of the Louisiana decision is to undo the certainty of the applicable rate discussed above.

The Louisiana Supreme Court did not directly confront the question of whether it was making a just and reasonable rate determination and thus overstepping its authortiy. Rather, the Court reasoned that it was only attempting to remedy a contract breach, and that it was speculating about the Commission's likely response to a timely filing by the Hall group only for the purpose of calculating the damages that the Hall group probably suffered as a consequence of Arkla's breach. While we do not question the adequacy of this reasoning under Louisiana law, we believe the damage award constitutes a rate increase without the Commission's having determined that the new rate is just and reasonable, to the detriment of the Federal statutory scheme. Simply put, if the mere fact that a state court may have concurrent jurisdiction over a contract is sufficient to take all disputes that might arise under the contract, and all possible remedies that might be found for breach of the contract, outside the scope of the Natural Gas Act, then the certainty as to rates that results from the filing requirements in Section 4(c) and 4(d) of the Natural Gas Act is lost, and the Commission's exclusive jurisdiction to determine just and reasonable rates for interstate gas is rendered meaningless.

The case most closely on point is *Montana-Dakota, supra*. Although the question at issue in *Montana-*

Dakota was somewhat different, since the case arose when plaintiff sought damages grounded in fraud in a federal district court, there is much in *Montana-Dakota* to provide guidance here. In particular, the court stated (341 U.S. at 251) that "[petitioner] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." [14] Thus, the most the Louisiana courts were empowered to do in this circumstance as to the 1961-1972 period was to construe the contract (the Commission having disclaimed primary jurisdiction) and reach the conclusion that under the contract the Hall group was entitled to file a rate increase application with the Commission.

Cities Service is not to the contrary. There the court found that Cities Service had breached its contractual obligation to cooperate with Western in an abandonment proceeding before the Commission. Accordingly, *Cities Service* was ordered to pay damages

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[14] Mr. Justice Jackson, speaking for the majority, stated later in the opinion (341 U.S. at 252) that "if the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act." As we have noted (fn. 5 *supra*), the Louisiana courts were unable, on the record before them, to find such active fraud or deceit. Thus we do not believe that, in this instance, the Louisiana courts have the authority to authorize a price other than the filed rate for natural gas sold in interstate commerce. However, this Commision, in determining whether good cause exists for waiver of the notice requirements of Section 4(d), may take into account and attribute appropriate weight to the withholding from the Hall group of the information necessary for the Hall group to determine that it was entitled under the contract to file a rate increase application with the Commission.

to compensate Western for the money Western had lost as a result of its inability to market its gas elsewhere. Thus, in *Cities Service*, there was no dispute between the parties regarding the proper interpretation of the price terms of their contract. Unlike the instant case, the damages awarded in *Cities Service* did not constitute additional monies reflecting a putative increase in the price at which gas had been sold in past transactions.[15] Accordingly, the litigation in *Cities Service* had no impact upon the Commission's obligation to ensure that interstate sales

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[15] Put another way, the award of damages in *Cities Service* did not consist of the difference between the Commission-determined just and reasonable rate for Western's sales to Cities service and an alternative price for the same gas sold and bought by the same parties, based upon an assumption that the Commission somehow would have found the alternative price, rather than the filed rate, to be just and reasonable. As the court stated in Cities Service (535 F.2d at 1287):

> [T]he Oklahoma courts and the FPC were confronted with separate and distinct issues—the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the natural gas act to pay the just and reasonable rate for gas served and delivered to it . . . .

By contrast, in the instant case the Louisiana courts have, in effect, determined a rate that, in their view, should have been the just and reasonable rate—a determination that is within this Commission's *exclusive* jurisdiction. *See Montana-Dakota, supra.* The *Cities Service* decision (535 F.2d at 1287) lists a number of other factors, in addition to the price of the gas as sold to Western, that the Oklahoma court took into account in determining damages. In the instant case, there are no factors other than the difference between the filed rate and the rate the Louisiana courts thought appropriate under the contract.

of gas are made in accordance with the rate and filing requirements prescribed in Sections 4 and 5.

B. *Merits of Hall's Request for Waiver of Section 4(d)*

This holding does not, however, end the inquiry. The Hall group has asked in the alternative that we waive the filing requirements of Section 4(d) for good cause so as to give effect to the Louisiana court's finding on the contract as of 1961.

In the circumstances of this case, we are unable to conclude that good cause exists to waive the Section 4(d) filing requirements. The basis for our view that waiver would be inappropriate is the long-established "statutory bias" against retroactive rate increases.[16] What makes the rate increases in this case particularly unacceptable is the uncommonly severe nature of the retroactivity proposed. Hall is here attempting to expose consumers to a potential liability for higher rates beginning in 1961 and continuing for some 11 years thereafter. This we simply cannot sanction.

We are also very concerned about the possible unsettling effect that a waiver in this case might have on other gas purchase transactions. If the Hall group is granted a higher rate for its gas effective in 1961, there is a strong likelihood that claims would arise asserting that this increase triggered the operation of indefinite price escalator provisions[17] in other

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[16] *Gillring* v. *FERC*, 566 F.2d 1323, 1325 (5th Cir., 1978) describing the effect of the filed rate doctrine.

[17] In 1961, the Commission outlawed most indefinite pricing provisions in newly-executed contracts. Such provisions in existing contracts, however, could continue to operate. Order No. 232, 25 FPC 379 (1961); *The Pure Oil Company*, 25 FPC 383 (1961).

contracts in the Sligo Field geographical area, quite possibly involving pipelines other than Arkla.[18] This, of course, would open the door to additional rate increase requests and requests for waiver for the same period. As a matter of policy, we do not believe it is in the public interest to take actions in the name of equity that have the potential for reopening transactions which took place almost 20 years ago. The potential impact of such reopenings on our regulatory responsibilities appears substantial.[19]

Finally, we confess that we are at least troubled by the prospect of speculating as to what the Commission would or would not have done in 1961 had it been confronted at that time with a rate increase filing by the Hall group. The filing would, of course, have been based upon the Hall group's contention that a royalty payment activated its favored nations clause. Since a question of contractual authorization for the rate increase would have arisen, the Commission, we believe, would almost certainly have either suspended or rejected the filing.[20] Whether the Commission in

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[18] Our records indicate that there may be a number of contracts so affected. Some contracts signed by other pipelines contain clauses which are triggered upon the payment of a higher price by any buyer in a geographical area.

[19] We declined to assert our primary jurisdiction in the May 18, 1979 order in large part because we perceived no significant effect upon our regulatory responsibilities resulting from an interpretation of the favored nations clause favorable to the Hall group. Had we not believed that the filed rate doctrine banned a rate increase (through damages) for the 1961-1972 period, we no doubt would have had serious misgivings about declining jurisdiction over the question of contract interpretation.

[20] The Louisiana Supreme Court assumed that the Commission would have accepted the filing, based upon the November 8, 1976, order of the FPC. 368 So.2d at 991. How-

1961 would have provided a forum for resolving the contractual dispute is a question we cannot answer definitively; under the grounds asserted by the FPC in 1976 for disclaiming primary jurisdiction over the contract interpretation question and under the different grounds adopted by the Commission in its May 18, 1979, order, the Commission would have taken jurisdiction over the contract interpretation in 1961. At that time, the Commission might well have concluded that the favored nations clause was not triggered. More importantly, even if the Commission in 1961 had reached the same contractional interpretation as the Louisiana court, the Commission might have determined that the public interest would not permit the grant of rate increases based upon the triggering of favored nations clauses even in existing contracts.[21]

We recognize the determination of the Louisiana courts that the Hall group did not file for a rate increase in 1961 because Arkla withheld from the Hall group information that the Louisiana courts found Arkla was required to give the Hall group, and we realize that as between the Hall group and Arkla, the equities are favorable to the Hall group. But the Louisiana courts did not find active fraud or deceit in this withholding of information, and our own review of the record before us leads us to con-

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ever, neither the FPC in 1976 nor the Commission today purports to declare what the FPC's actions would have been in 1961.

[21] As we have already noted, the Commission acted in 1961 to outlaw indefinite pricing provisions and deny effect to newly-executed contracts. If the Commission had extended this policy to such clauses in existing contracts, it might have done so only where government royalty payments were involved; or it might have done so across-the-board.

clude that Arkla could have reasonably assumed that the government royalty payment did not trigger the indefinite price escalator in the contract with the Hall group. More importantly, as is discussed at some length above, we must place this particular case in the context of our broader regulatory responsibilities. And on balance, after considering the matter in this broader context, we cannot accept the potential for disruption of natural gas markets or the speculation as to how our predecessors would have acted nineteen years ago. Therefore, we deny waiver.

In summary, we find that good cause does not exist to waive notice provisions of Section 4(d). Accordingly, the Hall group's application will be denied.

The Commission orders:

The Hall group's request for a waiver of the filing requirements prescribed in Section 4(d) of the Natural Gas Act is denied.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB
Secretary

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APPENDIX C

ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 78-1789. Argued April 20, 1981—Decided July 2, 1981

In 1952, respondent natural gas producers and petitioner entered into a contract under which respondents agreed to sell petitioner natural gas from a certain gas field in Louisiana. The contract contained a fixed price schedule and a "favored nations clause," which provided that if petitioner purchased gas from the gas field from another party at a higher rate than it was paying respondents, then respondents would be entitled to a higher price for their sales to petitioner. In 1954, respondents filed the contract and their rates with the Federal Power Commission (now the Federal Energy Regulatory Commission) and obtained from it a certificate authorizing the sale of gas at the specified contract rates. In 1961, petitioner purchased certain leases in the same gas field from the United States and began producing gas on its leasehold. In 1974, respondents filed an action in a Louisiana state court, contending that petitioner's lease payments to the United States had triggered the favored nations clause. Because petitioner had not increased its payments to respondents as required by that clause, respondents sought as damages an amount equal to the difference between the price they actually were paid in the intervening years and the price they would have been paid had that clause gone into effect. Although finding that the clause had been triggered, the trial court held that the "filed rate doctrine," which prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the Commission pursuant to the Natural Gas Act, precluded an award of damages for the period prior to 1972 (the time during which respondents were subject to the Commission's jurisdiction). The intermediate appellate court affirmed, but the Louisiana Supreme Court reversed, holding that respondents were entitled to damages for the period between 1961 and 1972 notwithstanding the filed rate doctrine. The court reasoned

that petitioner's failure to inform respondents of the lease payments to the United States had prevented respondents from filing rate increases with the Commission, and that if they had done so the increases would have been approved.

Held: The filed rate doctrine prohibits the award of damages for petitioner's breach during the period that respondents were subject to the Commission's jurisdiction. Pp. 576-585.

(a) The Natural Gas Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold. Here, the Louisiana Supreme Court's ruling amounts to nothing less than the award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case. This is precisely what the filed rate doctrine forbids. It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act. Pp. 576-579.

(b) Congress has granted exclusive authority over rate regulation to the Commission, and, in so doing, withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It would be inconsistent with this purpose to permit a state court to do through a breach-of-contract action what the Commission may not do. Under the filed rate doctrine, the Commission alone is empowered to approve the higher rate respondents might have filed with it, and until it has done so, no rate other than the one on file may be charged. The court below thus has usurped a function that Congress has assigned to a federal regulatory body. Cf. *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311. This the Supremacy Clause will not permit. Pp. 579-582.

(c) Under the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate prevails. P. 582.

(d) Permitting the state court to award what amounts to a retroactive right to collect a rate in excess of the filed rate "only accentuates the danger of conflict," and no appeal to equitable principles can justify such usurpation of federal authority. Pp. 583-584.

368 So.2d 984, affirmed in part, vacated in part, and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, WHITE and BLACKMUN, JJ., joined. POWELL, J., filed a dissenting opinion, *post*, p. 585. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 586. STEWART, J., took no part in the consideration or decision of the case.

Reuben Goldberg argued the cause for petitioner. With him on the briefs were *Robert Roberts, Jr.*, *Marlin Risinger, Jr.*, *W. Michael Adams*, and *Glenn W. Letham*.

James Fleet Howell argued the cause and filed a brief for respondents.*

JUSTICE MARSHALL delivered the opinion of the Court.

The "filed rate doctrine" prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the Federal Energy Regulatory Commission pursuant to the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. § 717 *et seq.* (1976 ed. and Supp. III). The question before us is whether that doctrine forbids a state court to calculate damages in a breach-of-contract action based on an assumption that had a higher rate been filed, the Commission would have approved it.

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General McCree, Elliott Schulder, Jerome Nelson, Jerome M. Feit*, and *Joshua Z. Rokach* for the United States et al.; and by *Edward Kliewer, Jr.*, *Dean W. Wallace*, and *Patrick J. McCarthy* for Northern Natural Gas Co.

James R. Coffee and *Edward J. Kremer* filed a brief for Atlantic Richfield Co. as *amicus curiae* urging affirmance.

I

Respondents are producers of natural gas, and petitioner Arkansas Louisiana Gas Co. (Arkla) is a customer who buys their gas. In 1952, respondents[1] and Arkla entered into a contract under which respondents agreed to sell Arkla natural gas from the Sligo Gas Field in Louisiana. The contract contained a fixed price schedule and a "favored nations clause." The favored nations clause provided that if Arkla purchased Sligo Field natural gas from another party at a rate higher than the one it was paying respondents, then respondents would be entitled to a higher price for their sales to Arkla.[2] In 1954, respondents filed with the Federal Power Commission (now the Federal Energy Regulatory Commission)[3] the contract and their rates and obtained from the Commission a certificate authorizing the sale of gas at the rates specified in the contract.

In September 1961, Arkla purchased certain leases in the Sligo Field from the United States and began producing gas on

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[1] Respondents include both original parties to the contract and successors in interest to parties to the contract.

[2] The favored nations clause provided in relevant part:

"If at any time during the term of this agreement Buyer should purchase from another party seller gas produced from the subject wells or any other well or wells located in the Sligo Gas Field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the difference between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract." App. 99.

[3] On October 1, 1977, the relevant responsibilities of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission. See 10 CFR § 1000.1(d) (1980). The term "Commission" in this opinion refers to the Federal Power Commission when referring to action taken prior to that date and to the Federal Energy Regulatory Commission when referring to action taken after that date.

its leasehold. In 1974, respondents filed this state-court action contending that Arkla's lease payments to the United States had triggered the favored nations clause. Because Arkla had not increased its payments to respondents as required by the clause, respondents sought as damages an amount equal to the difference between the price they actually were paid in the intervening years and the price they would have been paid had the favored nations clause gone into effect.

In its answer, Arkla denied that its lease payments were purchases of gas within the meaning of the favored nations clause. Arkla subsequently amended its answer to allege in addition that the Commission had primary jurisdiction over the issues in contention. Arkla also sought a Commission ruling that its lease payments had not triggered the favored nations clause. The Commission did not act immediately, and the case proceeded to trial. The state trial court found that Arkla's payments had triggered the favored nations clause, but nonetheless held that the filed rate doctrine precluded an award of damages for the period prior to 1972. The intermediate appellate court affirmed, 359 So. 2d 255 (1978), and both parties sought leave to appeal. The Supreme Court of Louisiana denied Arkla's petition for appeal, 362 So. 2d 1120 (1978), and Arkla sought certiorari in this Court on the question whether the interpretation of the favored nations clause should have been referred to the Commission. We denied the petition. 444 U.S. 878 (1979).

While Arkla's petition for certiorari was pending, the Supreme Court of Louisiana granted respondents' petition for review and reversed the intermediate court on the measure of damages. 368 So. 2d 984 (1979). The court held that respondents were entitled to damages for the period between 1961 and 1972 notwithstanding the filed rate doctrine. The court reasoned that Arkla's failure to inform respondents of the lease payments to the United States had prevented respondents from filing rate increases with the Commission, and that had respondents filed rate increases with the Commission, the rate increases would have been approved. *Id.*, at 991. After the

decision by the Supreme Court of Louisiana, the Commission in May 1979 finally declined to exercise primary jurisdiction over the case, holding that the interpretation of the favored nations clause raised no matters on which the Commission had particular expertise. *Arkansas Louisiana Gas Co.* v. *Hall*, 7 F.E.R.C. ¶ ____, p. ____.[4] The Commission did, however, state: "It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine." *Id.*, at ____ - ____, n. 18.[5] Under that doctrine, no regulated seller is legally entitled to collect a rate in excess of the one filed with the Commission for a particular period.

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[4] The May 1979 order was actually the Commission's second decision on primary jurisdiction. The Commission initially declined to exercise primary jurisdiction in March 1976, citing a then-existing policy against assuming jurisdiction over matters pending before a court. *Arkansas Louisiana Gas Co.* v. *Hall*, 55 F. P. C. 1018, 1020-1021. On rehearing, the Commission further noted that on October 19, 1972, respondents had gained "small producer" status, see n. 5, *infra*, and were therefore no longer required to make rate increase filings. *Arkansas Louisiana Gas Co.* v. *Hall*, 56 F. P. C. 2905 (1976). Arkla challenged the Commission's automatic deferral policy before the United States Court of Appeals for the District of Columbia Circuit. While the matter was pending before that court, the Commission asked that the record be remanded to it for further consideration, and the Court of Appeals granted the motion. The May 1979 order resulted from this remand, and review of that order is pending before the Court of Appeals.

[5] The Commission limited its disagreement with the state court to the period before 1972 because of its additional finding that as of October 1972 respondents had become "small producers" and were no longer required to file their rates with the Commission. See 18 CFR § 157.40 (1980). It therefore took the position that the filed rate doctrine did not apply to respondents after that date. Arkla disputes here the administrative determination that respondents met the criteria to be considered "small producers." The Commission's finding itself is not before us, and we do not believe that the state courts erred in deferring to that finding.

See *infra*, at 576-579. We granted Arkla's subsequent petition for certiorari challenging the judgment of the Louisiana Supreme Court. 449 U.S. 1109 (1981).[8]

II

Sections 4(c) and 4(d) of the Natural Gas Act, 52 Stat. 822, 15 U.S.C. §§ 717c(c) and 717c(d), require sellers of natural gas in interstate commerce to file their rates with the Commission. Under § 4(a) of the Act, 52 Stat. 822, 15 U.S.C. § 717c(a), the rates that a regulated gas company files with the Commission for sale and transportation of natural gas are lawful only if they are "just and reasonable." No court may substitute its own judgment on reasonableness for the judgment of the Commission. The authority to decide whether the rates are reasonable is vested by § 4 of the Act solely in the Commission, see *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944), and "the right to a reasonable rate is the right to the rate which the Commission files or fixes," *Montana-Dakota Utilities Co.* v. *North-*

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[8] Subsequent to the award of damages but prior to our action on Arkla's petition for certiorari, the Commission informed respondents that in order to collect a damages award amounting to a retroactive rate increase, they would have to ask the Commission to waive the filing requirements of the Natural Gas Act. Respondents sought a waiver, which was denied by the Commission. *Arkansas Louisiana Gas Co.* v. *Hall*, 13 F. E. R. C. ¶ 61,000 (1980). In its order, the Commission explained that in order to grant a waiver, it would have to "speculat[e] as to what the Commission would or would not have done in 1961 . . . ." *Id.*, at 61,213. The Commission added that because the request for an increase called for contract interpretation, the 1961 Commission "would almost certainly have either suspended or rejected the filing." *Ibid.* The Commission added that granting a waiver in this case would present a "potential for disruption of natural gas markets." *Ibid.* Review of that order is pending before the United States Court of Appeals for the Fifth Circuit.

western Public Service Co., 341 U.S. 246, 251 (1951).[7] Except when the Commission permits a waiver, no regulated seller of natural gas may collect a rate other than the one filed with the Commission. § 4(d), 52 Stat. 823, 15 U.S.C. § 717c(d). These straightforward principles underlie the "filed rate doctrine," which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority. See, *e.g.*, *T. I. M. E. Inc.* v. *United States*, 359 U.S. 464, 473 (1959). The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act, see, *e.g.*, *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939); *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U.S. 184, 196-97 (1913), and has been extended across the spectrum of regulated utilities. "The considerations underlying the doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *City of Cleveland* v. *FPC*, 174 U.S. App. D.C. 1, 10, 525 F.2d 845, 854 (1976). See *City of Piqua* v. *FERC*, 198 U.S. App. D.C. 8, 13, 610 F.2d 950, 955 (1979).

Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively.[8] When

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[7] *Montana-Dakota Utilities* was a case under the Federal Power Act rather than under the Natural Gas Act, but as we have previously said, the relevant provisions of the two statutes "are in all material respects substantially identical." *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 353 (1956). In this opinion we therefore follow our established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes. See, *e.g.*, *ibid.*; *Permian Basin Area Rate Cases*, 390 U. S. 747, 820-821 (1968).

[8] Although the Commission may not *impose* a retroactive rate alteration and, in particular, may not order reparations, see, *e.g.*, *FPC* v. *Sunray DX Oil Co.*, 391 U. S. 9, 24 (1968), it may "for good

the Commission finds a rate unreasonable, it "shall determine the just and reasonable rate . . . to be *thereafter* observed and in force." § 5(a), 52 Stat. 823, 15 U.S.C. § 717d(a) (emphasis added). See, *e.g.*, *FPC* v. *Tennessee Gas Co.*, 371 U.S. 145, 152-53 (1962); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). This rule bars "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." *City of Piqua* v. *FERC*, *supra*, at 12, 610 F.2d, at 954.

In sum, the Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold. Petitioner Arkla and the Commission as *amicus curiae* both argue that these rules taken in tandem are sufficient to dispose of this case. No matter how the ruling of the Louisiana Supreme Court may be characterized, they argue, it amounts to nothing less than the award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case. This, they contend, is precisely what the filed rate doctrine forbids. We agree. It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act. Following that course would permit state courts to grant regulated sellers greater relief than they could obtain from the Commission itself.

In asserting that the filed rate doctrine has no application here, respondents contend first that the state court has done no more than determine the damages they have suffered as a

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cause shown," 15 U. S. C. § 717c(d), waive the usual requirement of timely filing of an alteration in a rate. Assuming, *arguendo*, that waiver is available for retroactive collection of a higher rate than the one on file, we note that in this case, the Commission has expressly found that respondents have not demonstrated that good cause exists for waiving the filing requirements on their behalf. See n. 6, *supra*.

result of Arkla's breach of the contract.[9] No federal interests, they maintain, are affected by the state court's action. But the Commission itself has found that permitting this damages award could have an "unsettling effect . . . on other gas purchase transactions" and would have a "potential for disruption of natural gas markets . . . ." *Arkansas Louisiana Gas Co.* v. *Hall*, 13 F. E. R. C. ¶ 61,100, p. 61,213 (1980).[10]

Even were the Commission not on record in this case, the mere fact that respondents brought this suit under state law would not rescue it, for when Congress has established an exclusive form of regulation, "there can be no divided authority over interstate commerce." *Missouri Pacific R. Co.* v. *Stroud*, 267 U.S. 404, 408 (1925). Congress here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.

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[9] Arkla seeks to have this Court determine, as a matter of law, whether it actually breached its contract with respondents. This we decline to do. We see no reason to disagree with the Commission's judgment that interpretation of the favored nations clause raises only questions of state law. The state court found that the contract had been breached. We will not overturn the construction of Louisiana law by the highest court of that State.

[10] Apparently in an effort to challenge this determination, respondents assert that the damages would be paid entirely from Arkla's corporate assets and would not be passed on to consumers. We see no reason why this fact, even if true, would alter our analysis. In any case, the record does not support respondents' assertion that Arkla could not pass the damages award along to its customers. In its order denying respondents' request for a waiver of the § 4(d) notice requirement, the Commission conceded that Arkla would have the right to do so, even though all the natural gas for which Arkla would be paying was long since sold. 13 F. E. R. C., at 61,213.

We rejected an analogous claim earlier this Term in *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). There, a shipper of goods by rail sought to assert a state common-law tort action for damages stemming from a regulated rail carrier's decision to cease service on a rail line. We held unanimously that because the Interstate Commerce Commission had, in approving the cessation, ruled on all issues that the shipper sought to raise in the state-court suit, the common-law action was pre-empted. In reaching our conclusion, we explained that "[a] system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act." *Id.*, at 326. To hold otherwise, we said, would merely approve "an attempt by a disappointed shipper to gain from the Iowa courts the relief it was denied by the Commission." *Id.*, at 324.

In the case before us, the Louisiana Supreme Court's award of damages to respondents was necessarily supported by an assumption that the higher rate respondents might have filed with the Commission was reasonable. Otherwise, there would have been no basis for that court's conclusion, 368 So. 2d, at 991, that the Commission would have approved the rate. But under the filed rate doctrine, the Commission alone is empowered to make that judgment, and until it has done so, no rate other than the one on file may be charged. And far from approving the rate here in issue, the Commission has expressly declied to speculate on what its predecessor might have done.[11]

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[11] Respondents assert, and the Supreme Court of Louisiana found, that the Commission has expressly approved the damages award through its repeated statements that the award is not in excess of applicable ceilings. This is simply not the case. The court below based its conclusion on the Commission's order denying rehearing on Arkla's request that it exercise primary jurisdiction. 368 So. 2d, at 991, citing *Arkansas Louisiana Gas Co.* v. *Hall*, 56 F. P. C. 2905 (1976). Nothing in that order approves the retroactive rate increase;

The court below, like the state court in *Kalo Brick*, has consequently usurped a function that Congress has assigned to a federal regulatory body. This the Supremacy Clause will not permit.

Respondents' theory of the case would give inordinate importance to the role of contracts between buyers and sellers in the federal scheme for regulating the sale of natural gas. Of

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it only lists, at the request of the parties, "the maximum rates . . . which, if contractually authorized and if proper filing procedures had been followed, would have been approved . . . ." *Id.*, at 2906. The fact that the retroactive rate increase was within the rate ceiling does not mean that it would have been approved if actually submitted, and certainly does not mean that it would be approved after the fact. In rejecting respondents' request for a waiver of its filing requirements, the Commission set forth several reasons for disapproving a rate increase falling within the ceiling rates and expressly declined to speculate on what the earlier Commission might have done. See n. 6, *supra*.

In addition to the order denying rehearing, respondents also rely on language in the Commission's May 18, 1979, order declining to exercise primary jurisdiction and in a letter from the Commission's staff counsel. Staff counsel's letter is ambiguous at best, and in any case, it should be unnecessary to add that staff counsel may not speak for the Commission. The language relied on in the May 18 order appears to have reference only to damages for the period after 1972. The same order twice disapproves granting damages for the period prior to respondents' assumption of small producer status. See *Arkansas Louisiana Gas Co.* v. *Hall*, 7 F. E. R. C. ¶ ____, pp. ____-____, n. 18 (1979) ("It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine"); *id.*, at ____, n. 20 ("As we stated above, the Louisiana Supreme Court, in effect, waived one of this Commission's filing requirements when it determined that [respondents'] group was entitled to damages back to 1961. This holding of the Louisiana Supreme Court conflicts with the filed rate doctrine"). The unconnected and ambiguous references on which respondents and the court below rely to find Commission "approval" of the retroactive rate increase cannot override these express statements of disapproval.

course, as we have held on more than one occasion, nothing in the Act *forbids* parties to set their rates by contract. *E.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 820-822 (1968); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338-340 (1956). But those cases stand only for the proposition that the Commission itself lacks affirmative authority, absent extraordinary circumstances, to "abrogate existing contractual arrangements." *Permian Basin Area Rate Cases*, *supra*, at 820. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*, at 338-339. That rule does not affect the supremacy of the Act itself, and under the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls. See, *e.g.*, *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Texas & Pacific R. Co.* v. *Mugg*, 202 U.S. 242, 245 (1906). "This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress . . . ." *Louisville & Nashville R. Co.* v. *Maxwell*, *supra*, at 97. Moreover, to permit parties to vary by private agreement the rates filed with the Commission would undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*, at 338-339.[12]

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[12] None of the other cases relied on by respondents commands a contrary result. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950), held only that federal courts are not granted jurisdiction over state-law declaratory judgment actions merely because a federal question might potentially be raised in defense of the suit. The only issue in *Skelly Oil* was whether certain contracts had properly been terminated, so there was no occasion to consider whether the filed rate doctrine barred a damages remedy. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U. S. 103 (1958), like the cases mentioned in text, held only that the Act does not automatically abrogate all private contracts. And *Pan American Petroleum Corp.* v. *Superior Court*, 366 U. S. 656 (1961), stated only that a state rather than a federal court was the proper forum in which a buyer

Respondents also appeal to what they say are equitable considerations. The filed rate doctrine and the Supremacy Clause, we are told, should not bar recovery when the defendant's misconduct prevented filing of a higher rate. We do not find this argument compelling. The court below did not find that Arkla intentionally failed to inform respondents of its lease payments to the United States in an effort to defraud them. Consequently, we are not faced with affirmative misconduct, and we need not consider the application of the filed rate doctrine in such a case.[13] The courts below found that Arkla has done no more than commit a simple breach of its contract. But when a court is called upon to decide whether state and federal laws are in conflict, the fact that the state law has been violated does not affect the analysis. Every pre-emption case involves a conflict between a claim of right under federal law and a claim

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should bring a breach-of-contract action to obtain a refund of charges in *excess* of the filed rate. Permitting that action in no way contravened the filed rate doctrine; in fact, it furthered the doctrine's purpose.

We note that a panel of the District of Columbia Circuit stated in *City of Cleveland* v. *FPC*, 174 U. S. App. D. C. 1, 10-11, 525 F. 2d 845, 854-855 (1976), that "the proposition that a filed rate variant from an agreed rate is nonetheless the legal rate wages war with basic premises of the . . . Act." That case is immediately distinguishable from the one before us because it involved a claim that the rate itself had been filed in violation of a contract. We express no opinion on the merits of that case, but to the extent that the quoted dictum would lead to a contrary result in the instant case, it is expressly disapproved.

[13] We agree with the Commission's finding that Arkla "could have reasonably assumed that the government royalty payment did not trigger the [favored nations clause]." 13 F. E. R. C., at 61,213. Because the record contains no findings of misconduct, respondents' argument that this Court has consistently recognized the doctrine of estoppel has no relevance. We save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct.

or right under state law. A finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed. Thus in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the mere fact that a group of unions violated state law through their peaceful picketing did not permit enforcement of that law when it would conflict with the federal regulatory scheme. That the state-court suit was one for damages rather than for the type of relief available from the National Labor Relations Board weighed against pre-emption, not in favor of it. "[S]ince remedies form an ingredient of any integrated scheme of regulation," Justice Frankfurter wrote for the Court, "to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." *Id.*, at 247.

The same principle applies here. Permitting the state court to award what amounts to a retroactive right to collect a rate in excess of the filed rate "only accentuates the danger of conflict." No appeal to equitable principles can justify this usurpation of federal authority.

III

We hold that the filed rate doctrine prohibits the award of damages for Arkla's breach during the period that respondents were subject to Commission jurisidiction.[14] In all respects other than those relating to damages, the judgment of the Supreme Court of Louisiana is affirmed. With respect to its calculation of damages, the judgment is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE STEWART took no part in the consideration or decision of this case.

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[14] There is no bar to damages for the period after respondents gained "small producer" status. See n. 5, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 78–1789

Arkansas Louisiana Gas Company, Petitioner, *v.* Frank J. Hall et al. | On Writ of Certiorari to the Supreme Court of Louisiana.

[July 2, 1981]

JUSTICE POWELL, dissenting.

I agree with much of JUSTICE STEVENS' dissenting opinion and would affirm the judgment of the Supreme Court of Louisiana. Respondents are entitled to the relief they seek based on Louisiana state contract law.

By virtue of the "most favored nation" clause in its contract with respondents, petitioner was obligated to pay respondents the higher rate it paid a comparable supplier. Petitioner did not comply with this provision, but the Court today holds that respondents nevertheless may not recover damages because they failed to file with the Commission the increased rate. It is said that the "filed rate doctrine" requires such a filing.

I would agree with the Court if it were clear that respondents were neglectful or otherwise at fault in not filing and seeking Commission approval of the higher rate. But the Louisiana courts found that petitioner was responsible for respondents' failure to file. Petitioner did not disclose that it was paying higher rates to another producer from the same field under comparable conditions. The Louisiana Court of Appeals expressly found that respondents' failure to comply with the filed rate doctrine was caused primarily by the "uncooperative and evasive" conduct of petitioner's officials. See 359 So. 2d 255, 264 (1978). Petitioner knew the facts, and the Louisiana Supreme Court held that petitioner had a state-

law duty to disclose them in order not to frustrate the "most favored nation" clause. There is no showing that respondents had any knowledge of their entitlement to invoke the clause until they finally obtained the facts through the Freedom of Information Act. In these circumstances, the filed rate doctrine should not preclude a state-law damages action. In holding to the contrary, the Court in effect rewards petitioner's breach of its state law contractual duty to notify respondents that it was paying a higher rate to a comparable supplier.

SUPREME COURT OF THE UNITED STATES

No. 78–1789

Arkansas Louisiana Gas Company, Petitioner, *v.* Frank J. Hall et al. | On Writ of Certiorari to the Supreme Court of Louisiana.

[July 2, 1981]

JUSTICE STEVENS, with whom JUSTICE REHNQUIST joins, dissenting.

From 1961 through 1975, petitioner Arkansas Louisiana Gas Co. (Arkla) acquired natural gas from two different sources in the Sligo Gas Field in Louisiana. By the terms of a contract that was entirely consistent with the federal policies reflected in the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717 *et seq.*, Arkla was obligated to pay both sources of supply the same price.[1] In fact, however, unbeknown to respondents, and in violation of their contract, Arkla paid them a substantially lower price than it paid to the United States, its other source for Sligo Field gas. No one, not even Arkla, suggests that there is any legitimate justification for the discrimination.

Despite the fact that Arkla breached its contract, and despite the fact that no federal policy is threatened by allowing the Louisiana courts to redress that breach, the Court today denies respondents the benefit of their lawful bargain. Surely, if the price paid to the United States was just and reasonable, the same price paid to private sellers of gas taken from the same field at the same time and delivered to the same customer also would be just and reasonable. The stat-

[1] This obligation was created by the "favored nations clause" in the natural gas sales contract between Arkla and respondents. The clause is quoted *ante*, at 2, n. 2.

utory policy favors uniformity, not secret discrimination. Yet the Court, by a wondrous extension of the so-called "filed rate doctrine," concludes that the Louisiana courts may not assess damages against petitioner for breach of its contract to pay respondents the same price it paid to a comparable supplier. Because no federal rule of law deprives the State of Louisiana of the power to prevent Arkla from profiting so handsomely from its own wrong, and because I believe that enforcement of the state court's judgment is not only consistent with federal regulatory policies, but actually will further those policies, I respectfully dissent.

I

As a result of lengthy proceedings in the state courts, the relevant facts have been established. Arkla is an integrated utility company engaged in the natural gas business in six States.[2] Over the years, it has purchased large quantities of natural gas produced in the Sligo Gas Field in Bossier Parish, La.; some of that gas was acquired from respondents, and some from the United States. By law, Arkla was prohibited from paying either of these suppliers more than the area ceiling price set by the Federal Power Commission, and it did not do so.[3] By contract with the United States, Arkla was required to pay an amount established by reference "to the highest price paid for a part or for a majority of production of like quality in the same field." Joint App. 123. By contract with respondents, Arkla was obligated to pay them a

[2] Arkla does business in Arkansas, Louisiana, Texas, Oklahoma, Kansas, and Missouri.

[3] For example, in 1968 the relevant area base rate ceiling established by the Federal Power Commission for sales of natural gas was 18.6 cents per thousand cubic feet (MCF). See *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI76–28 (Nov. 8, 1976) (FPC), in Joint App. 183, 184. The trial court in this case found that during 1968 Arkla paid the United States a fraction over 14 cents per MCF. See Joint App. 11. Under the terms of the 1952 contract with respondents, Arkla paid a fraction under 10 cents per MCF for gas produced during 1968. See Joint App. 98.

price at least as high as it paid for other gas produced from any well located in the Sligo Field.[4] See *ante*, at 2, n. 2. In fact, however, it paid respondents only about two-thirds of the price paid to the United States.

Arkla did not disclose the price differential to respondents. The Louisiana Court of Appeal found that, in response to inquiries from respondents about the arrangement with the United States, "the officials of Arkla were uncooperative and evasive." 359 So. 2d 255, 264 (1978). That court characterized Arkla's nondisclosure and evasiveness as "not commendable," but held that because, under the law of Louisiana, a "party alleging fraud has the burden of establishing it by more than a mere preponderance of the evidence," respondents had failed to prove that Arkla was guilty of actual fraud. *Ibid.* It is clear, however, that Arkla's failure to disclose to respondents its discriminatory payments to another supplier in the same gas field constituted a breach of contract.[5]

The Louisiana Supreme Court decided that the damages for Arkla's breach of contract should be measured by the difference between the price paid to the United States and the

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[4] Although Arkla consistently has contended that its lease arrangement with the United States was not a "purchase" within the meaning of the favored nations clause in its contract with respondents, that issue has been resolved against Arkla by every court that has considered it. See Joint App. 16; 359 So. 2d 255, 261–262 (La. App. 1978); 368 So. 2d 984, 989, and n. 4 (La. 1979). See also *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F. 2d 569 (CA7 1971). The Court properly declines to reopen this question of state law. See *ante*, at 7, n. 9.

[5] Because the Louisiana courts held that the contract required Arkla to pay to respondents the higher price that was being paid to the United States, and because such payments could not have been made without revealing the existence of the higher price, there can be no doubt about Arkla's contractual duty to disclose the differential even though the Louisiana Supreme Court had no occasion to comment on this specific obligation other than by noting the applicability of the principle "that one should not be able to take advantage of his own wrongful act." 368 So. 2d, at 990.

price paid to respondents. For the period after 1972, when respondents had been formally certificated as "small producers," the court held that respondents had no obligation to file new rate schedules with the Federal Power Commission because the increased rates did not exceed the ceiling rate set by the Commission.[6] Although the court recognized that respondents could not have collected higher prices during the period between 1961 and 1972 without first filing new rate schedules with the Commission,[7] it held that damages for that period were nevertheless recoverable for two reasons. First, as a matter of Louisiana law, when a party's entitlement is subject to a condition, the condition is considered to have been fulfilled when performance is prevented by the other party.[8] In this case, the court squarely held that respondents had been effectively precluded from making the

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[6] The court explained the significance of respondents' certification as small producers:

"A 'small producer' (as defined by the Commission's regulations) may obtain a 'small producer certificate' exempting it from the requirement of having to file a rate schedule as long as the increase in rate does not exceed the ceiling rate set by the Commission. *See* 18 C. F. R. § 157.40. Several of the plaintiffs obtained 'small producer certificates' in October 1972, and the certificates issued to those parties were made effective as to all plaintiffs by order of the Commission." 368 So. 2d, at 990.

[7] Throughout this opinion, the term "Commission" refers to the Federal Power Commission with respect to actions taken before October 1, 1977, and to the Federal Energy Regulatory Commission with respect to actions taken thereafter. See *ante*, at 2, n. 3.

[8] This state law rule was explained, as follows:

"Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition, who prevents the fulfillment. *George W. Garig Transfer* v. *Harris*, *supra*; *Southport Mill* v. *Friedrichs*, *supra*; *Morrison* v. *Mioton*, *supra*. This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one should not be able to take advantage of his own wrongful act. See *Cox* v. *Department of Highways*, 252 La. 22, 209 So. 2d 9 (1962)." 368 So. 2d, at 990.

necessary filings by Arkla's failure to inform them of its contractual arrangement with the United States.[9] Second, after noting that respondents made no claim that they would have been entitled to an increase in excess of the area base rate ceilings established by the Commission.[10] and after noting that an order of the Commission had indicated that it would have approved the rate increase if it had been filed.[11] the court concluded that "it was more probable than not that the Commission would have approved a contractually-authorized price increase if the proper filing procedures had been followed." 368 So. 2d, at 991.

Summarizing the effect of the state courts' rulings, these propositions must be taken as having been established:

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[9] "To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act, were required to file new rate schedules with the Commission. However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller. Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commission, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government. Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled." 368 So. 2d, at 990.

[10] The Louisiana Supreme Court expressly noted its understanding of respondents' position:

"We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission." 368 So. 2d, at 991, n. 7.

[11] "At trial, a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and *if* proper filing procedures had been followed (Exhibit D–59). The Commission clearly indicated in its order that it would have approved such rates. No evidence was adduced by defendant to establish that Commission approval would have been unlikely." 368 So. 2d, at 991 (emphasis in original).

(1) Arkla breached its contract with respondents; (2) Arkla is responsible for respondents' failure to file new rate schedules with the Commission; (3) if such schedules had been filed, and if Arkla had paid respondents the same prices it paid to the United States, those prices would not have exceeded the applicable area rate ceilings established by the Commission; and (4) because prices well below the applicable rate ceilings are at the very least presumptively "just and reasonable," it is indeed more probable than not that the Commission would have approved the new rate schedule if it had been promptly filed. These propositions are plainly adequate to support respondents' recovery of damages as a matter of state law. In my opinion, they also support the conclusion that the applicable rules of state law have not been pre-empted by federal law.

II

Section 4 of the Natural Gas Act, 52 Stat. 822, 15 U. S. C. § 717c, identifies four separate federal policies that are arguably implicated by this litigation. The judgment of the Supreme Court of Louisiana is fully consistent with each of these policies.

First, subsection (a) of § 4 requires that all charges paid or received by regulated companies for the sale of natural gas shall be "just and reasonable." [12] In this case, there is no dispute about the fact that the prices received from Arkla by the United States were well below the relevant area ceiling rates fixed by the Federal Power Commission. It is equally clear that payment of the same prices to respondents for com-

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[12] Section 4 (a) of the Act provides:

"All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful." 52 Stat. 822, 15 U. S. C. § 717c (a).

parable gas contemporaneously produced in the same field also would have been well below the ceiling. Both the Louisiana courts and the Commission have repeatedly and unambiguously determined that if respondents had been paid in accordance with the terms of their contract, there would have been no violation of the applicable area ceiling rates.[13] Indeed, in noting that respondents were not required to file new rates for the period after they had been certificated as small producers in 1972, the Commission expressly found "that the rates requested are within what the Commission has determined to be the zone of reasonableness." [14]

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[13] See Joint App. 18–19; 368 So. 2d, at 991, and n. 7; *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI76–28 (Nov. 8, 1976) (FPC), in Joint App. 183, 184.

[14] In an order entered on May 18, 1979, declining to exercise jurisdiction to determine whether Arkla had violated the favored nations clause in its contract with respondents, the Federal Energy Regulatory Commission stated:

"Finally, we must decide now what impact this case has on our regulatory responsibilities. This type of case, involving small producers not required by regulation under the Natural Gas Act to file for rate increases authorized by contract, is not a matter of great import to our regulatory responsibility as we find no need for a uniform interpretation of a contractual provision, and find that the rates requested are within what the Commission has determined to be the zone of reasonableness.

"On the facts of this case, the damages do not exceed applicable area ceiling rates. The Louisiana Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group. In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed. The Supreme Court of Louisiana further stated:

"We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

"In light of the fact that the Hall group makes no claim for damages

It is perfectly clear that an award of damages against Arkla measured by the prices it paid to the United States will not violate the Act's substantive prohibition against charging rates that are not "just and reasonable." That prohibition has the same application to respondents for the period after 1972, when they were certificated as small producers, as it does for the period prior to 1972. In neither of those periods did the Commission specifically determine that the rates were "just and reasonable," but the record makes it clear that those rates were in fact within the zone of reasonableness established by the Commission during both periods. For the purpose of determining whether damages are recoverable in a state court breach of contract suit, there is no reason to treat the two periods differently. There is simply nothing in this record to suggest that a state court judgment that has the effect of allowing respondents to receive the same prices that Arkla paid to the United States would violate the *substantive* policy underlying the statutory requirement that all rates be just and reasonable.[15]

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higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case." *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI76–28 (May 18, 1979), in App. to Brief for the United States and the Federal Energy Regulatory Commission as *Amici Curiae* 1a, 12a–15a (footnotes omitted).

[15] Arkla has argued that the award of damages improperly included an amount attributable to the liquefiable hydrocarbons in the natural gas produced from respondents' wells. If that argument were valid, it would simply establish an error in the computation of the amount required to be paid to respondents under their contract, and would require adjustment of the post-1972, as well as the pre-1972, award. No tribunal has found any greater merit in this argument than in Arkla's continuing claims that it did not breach its contract because its lease arrangement with the United States did not trigger the favored nations clause, and that re-

Second, subsection (b) of § 4 expresses the strong federal policy—reflected in most regulatory statutes—against discriminatory pricing.[16] The result the Court reaches today not only tolerates a blatant violation of that policy, but also will encourage such violations in the future.

Entirely apart from Arkla's contractual undertaking to pay respondents the same price it paid to other producers of comparable gas in the same field, this statutory policy surely favors a holding that results in equal treatment of competing suppliers. Nothing other than Arkla's proven wrongdoing provides any explanation for its discrimination against respondents. For no one has pointed to any even arguably legitimate justification for any differential pricing at all—let alone a differential of the magnitude revealed by this record. The lesson this case will teach is that, notwithstanding the plain language in § 4 (b), it is perfectly proper to grant an undue preference if one can conceal it.

Third, subsection (c) of § 4 expresses a policy favoring the public disclosure of all rates and charges and all contracts which affect rates.[17] The contractual arrangement between

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spondents are not really small producers. At any rate, Arkla has challenged the Louisiana courts' computation of damages in a separate petition for certiorari, No. 79–1896, and the question thus is not properly presented here.

[16] Section 4 (b) provides:

"No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 52 Stat. 822, 15 U. S. C. § 717c (b).

[17] Section 4 (c) provides:

"Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time . . . and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules

Arkla and the United States relating to production in the Sligo Gas Field was not made available to the public. Only by resort to the remedies provided by the Freedom of Information Act were respondents able to obtain access to that contract and to confirm their suspicions that Arkla was violating its "favored nations" undertaking. By rewarding Arkla's successful concealment of a contract that directly affected rates payable for gas produced in the Sligo Field, the Court simply ignores the statutory policy which the Louisiana Supreme Court's judgment would plainly serve.

Fourth, subsection (d) of § 4 imposes a procedural requirement that is designed to protect the substantive policy interests reflected in the three preceding subsections.[18] Because none of these substantive policies is infringed in the slightest by the state court's judgment, it surely exalts procedure over substance to deny respondents relief because they were wrongfully prevented from following the normal statutory procedures.

Under the normal procedures, no change in rates may take

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showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 52 Stat. 822, 15 U. S. C. § 717c (c).

[18] Section 4 (d) provides:

"Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." 52 Stat. 823, 15 U. S. C. § 717c (d).

effect until after 30 days' notice is given to the Commission and to the public by filing a new schedule with the Commission. This filing requirement is designed to give the Commission the opportunity to prevent new rates from going into effect if it has reason to believe the new rates are not just and reasonable. In this case, if the record provided any basis for believing that the rates that Arkla paid to the United States were not just and reasonable—or that paying the same rates to these respondents would not have been equally just and reasonable—it might make some sense to argue that the filing requirement of § 4 (d) precludes recovery of damages for breach of contract. But to regard the filing requirement as an inflexible barrier to any recovery regardless of the substantive merits of the claim is neither necessary to further, nor even consistent with, the purpose of § 4 (d).[19]

It is commonplace that damages must often be measured by reference to a standard or an event that did not actually materialize. When an executory contract is breached, the attempt to measure the injured party's damages requires an evaluation of the benefits that probably would have resulted

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[19] One of the weaknesses in the Court's consideration of this issue is its implicit assumption that the filing requirement has the same importance under all regulatory statutes. Under the Natural Gas Act, however, the source of the rate is the parties' contract which must be filed to enable the Commission to review its reasonableness; in contrast, under the Interstate Commerce Act, because private rate agreements are precluded, the source of the rate is the carrier's filed tariff. As Justice Harlan pointed out for a unanimous Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 338:

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts."

if the breach had not occurred.[20] If an attorney hired by respondents to file a new rate schedule negligently failed to do so, he might defend against a malpractice complaint by arguing that respondents were not damaged because the Commission would have rejected the new rates in all events. But if respondents could prove that rejection was highly unlikely, it would be absurd to deny them any recovery at all simply because the defendant's own wrongdoing had made it impossible to know with absolute certainty that new rates would have been accepted as "just and reasonable." In damages actions, whether in tort or in breach of contract, it is often necessary to deal in probabilities.

This case also raises a question that requires the evaluation of probabilities. Because the rates in issue were below the applicable Commission ceilings, and because no legitimate reason for rejecting them has been adduced, it is only reasonable to presume that they would have become effective routinely. As a garden-variety issue of damages, there is no significant difference between this case and one in which a purchaser might have employed thugs to waylay the respondents' lawyer on the way to the Commission to prevent him from filing a new schedule.

Nor in terms of federal regulatory policy is there any difference between this case and hypothetical cases involving actual fraud or violence.[21] If damages cannot be measured

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[20] Every first-year law student is familiar with this rule:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Hadley* v. *Baxendale*, 9 Ex. 341, 354, 156 Eng. Rep. 145, 151 (1854).

[21] The Court seems to attach great significance to the fact that respondents failed to prove that Arkla was guilty of actual fraud, see *ante*, at 12, and n. 13, but suggests no reason why the case might be

by reference to any standard except a rate that has been duly filed with the Commission in accordance with the procedural requirements of § 4 (d), there could be no state law recovery no matter what kind of wrong prevented respondents from filing. And conversely, if a high probability that a timely filing would have been accepted is an adequate standard for measuring damages in a tort case, why should not that probability be adequate in a breach of contract case as well? The fact that a regulated carrier or seller has no right to collect a rate or price that has not been duly filed with the appropriate regulatory body is surely not a sufficient reason for leaping to the conclusion that an injured party may never prove damages by reference to a standard that is less certain than a filed rate.

The federal policy that comes closest to supporting Arkla's position is that of protecting the Commission's primary jurisdiction to determine whether or not a new rate is reasonable. But in this case the basic reasonableness determination was made by the Commission when it established the area rate ceilings. Because the rates at issue in this case are well below those ceilings, the danger that a court might venture into the area of ratemaking on its own is not present. Moreover, on more than one occasion Arkla requested the Commission to assume jurisdiction of this controversy, and the Commission consistently declined to do so.[22] In assessing damages for the breach of an executory contract, the state courts exercised a jurisdiction that the Commission did not have. In no sense did the Louisiana courts usurp the pri-

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decided differently if actual fraud had been proven by clear and convincing evidence. Surely a state court should not be able to avoid federal preemption of state remedies by applying a different label to conduct with precisely the same economic consequences. Cf. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 252–253.

[22] See *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI76–28 (Mar. 8, 1976) (FPC); *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI76–28 (May 18, 1979) (FERC).

mary jurisdiction of the Commission. In sum, whether we test the state court judgment against the substantive or the procedural requirements of the federal statute, it seems perfectly clear that the relief that has been awarded is fully consistent with federal policy.

III

Although, until today, the term "filed rate doctrine" had never been used by this Court, our prior decisions have established rather clear contours for the doctrine. It apparently encompasses two components, both of which are entirely consistent with the award of damages ordered by the Louisiana Supreme Court in this case.

First, the two cases that are generally accepted as the source of the doctrine, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246,[23] and *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464,[24] established that an

[23] In *Montana-Dakota Utilities*, the plaintiff claimed injury because the filed rates that had applied to past transactions with an affiliate allegedly were unjust and unreasonable, and had been fraudulently established. The ultimate issue was whether a federal claim for relief had been alleged, because there was no diversity of citizenship to support federal jurisdiction. The Court first held that the Federal Power Act's requirement that rates be reasonable did not provide a statutory basis for a federal cause of action because the courts have no authority to determine what a reasonable rate in the past should have been. The Court then held that the allegations of fraud added nothing to the plaintiff's federal claim. Assuming that an actionable wrong had been alleged, the Court concluded that in the absence of diversity, a federal court could only dismiss the complaint for failure to state a claim cognizable in federal court. And finally, the Court rejected the argument of Justice Frankfurter in dissent that it should fashion an implied federal judicial remedy in which the issue of reasonableness could be referred to the Commission. In refusing to create a federal remedy for a common law fraud, the Court assumed that appropriate relief would be available in a state tribunal. Its opinion surely cannot be read as pre-empting any such state claim.

[24] In *T. I. M. E. Inc.*, the Court refused to find a federal remedy for a shipper who claimed that the rates charged by a motor carrier were unreasonable and unlawful even though they had been properly filed with

entity whose prices or rates are regulated by a federal agency has no federal right to claim any rate or price that has not been filed with and approved by the agency. Thus, these respondents, without either filing the escalated rates or obtaining a waiver of the filing requirement, have no *federal* right to require Arkla to pay the higher rates. That does not mean, however, that they have no *contractual* right to require Arkla to do so. Cf. *Pan American Petroleum Corp.* v. *Superior Court*, 366 U. S. 656, 662–664. The question whether a state court could measure damages for breach of contract, or a tort, by reference to a rate schedule that presumably would have been accepted if it had been filed earlier is by no means the same as the question whether respondents had a federal right to collect such rates. There would be a valid federal objection to such a damages award if there were reason to believe that the parties had entered into an agreement to circumvent either a procedural or a substantive requirement of the Natural Gas Act, or if the litigation arguably represented a collusive method of granting an unlawful preference. But no such considerations are present in this case.

Second, *Montana-Dakota Utilities* and *T. I. M. E. Inc.* also

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the Interstate Commerce Commission. The case involved little more than a determination that the express remedies afforded against rail carriers in Part I and against water carriers in Part III of the Interstate Commerce Act, having been deliberately omitted from Part II, which regulated motor carriers, would not be judicially implied. In *T. I. M. E. Inc.*, as in *Montana-Dakota Utilities*, the question was whether a federal court had authority to decide that a filed rate was unlawful because it violated the reasonableness requirement of the relevant regulatory statute. In the present case, however, there is no claim that the price that Arkla paid to respondents was illegal in any sense. Both that price and the higher price paid to the United States were well within the zone of reasonableness and in full compliance with the statute's substantive requirements. The fact that respondents might not be able to assert a federal claim for violation of the federal statute sheds no light on the question whether their state law cause of action for breach of contract may be maintained.

recognize that the task of determining in the first instance what rate should be considered "reasonable" within the meaning of a regulatory statute is not a judicial task, but rather is a task for the administrative agency. But when the zone of reasonableness has already been established by an agency—as it has been in this case—that consideration simply does not apply to an award of damages measured by reference to a standard that is well within that zone.

In my judgment, the cases which gave rise to the filed rate doctrine are plainly distinguishable from the present case, and thus do not support the result the Court reaches today. In *Montana-Dakota Utilities* and *T. I. M. E. Inc.*, the plaintiff's claim was that the filed rate, which had already been approved by the relevant federal regulatory body, was nonetheless unreasonable in violation of federal statutory requirements.[25] The plaintiff's suit thus directly challenged the rate determinations of the federal agency without compliance with the judicial review procedures established in the governing statute.[26] In the present case, in contrast, respondents do

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[25] See also *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

[26] The concise statement of the holding in *Montana-Dakota Utilities* indicates that the Court's central concern was to bar actions which asserted a federal right to a "reasonable" rate other than that declared to be reasonable by the Commission:

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." 341 U. S., at 251–252.

Of course, in this case respondents are not invoking a federal right to receive a reasonable rate, but rather a state law right to receive the rate for which they contracted. Similarly, the Louisiana Supreme Court's decision is not based on a determination that the rate requested by respondents is "the only or the more reasonable one," but rather on a determination that respondents are entitled to that rate under their contract with Arkla.

not contend that the filed rate, approved by the Commission, is unreasonable or otherwise inconsistent with federal law; they contend only that they had a contractual right to receive a different reasonable rate under their contract with Arkla. Respondents do not seek to enforce a federal right outside the procedures established for the vindication of such rights, nor do they seek to overturn the determinations of the expert federal agency; respondents merely seek to recover the higher of two rates, both of which are within the federal zone of reasonableness, because it is the rate they contracted to receive.[27] Cf. *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84.

The unanimous decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Co.*, 350 U. S. 332, sheds more light on this case than do the cases on which the Court places its primary reliance. In *United Gas*, United, a regulated natural gas producer, supplied gas to Mobile under a long-term contract which had been filed with and approved by the Federal Power Commission. United thereafter filed with the Commission a new rate that purported to increase the price payable by Mobile under the contract. The Commission denied Mobile's request that it reject United's filing, and held that the increased rate was the applicable rate unless and until it was declared unlawful by the Commission. *Id.*, at 336–337.

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[27] This distinction not only undercuts the Court's reliance on the filed rate doctrine, but also renders wholly inapposite our decision earlier this Term in *Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.*, — U. S. —, on which the Court relies heavily. See *ante*, at 8–10. The filed rate doctrine was not remotely implicated in that decision. Our holding in *Kalo Brick* that the Interstate Commerce Commission had decided the precise issues that the shipper sought to raise in state court litigation is wholly dissimilar from this case in which the regulatory agency rejected the opportunity to decide the questions presented to the Louisiana courts. This is not merely an attempt by a disappointed litigant to gain from the state courts the relief it has been denied by the Commission. See *ante*, at 8–9.

This Court rejected the Commission's position, holding that compliance with the filing procedure of § 4 (d) was effective to establish a new rate only if that rate were otherwise lawful, that is, in compliance with contractual requirements. *Id.*, at 339–340. The Court found that although the new rate filed by United had been established in compliance with federal law, it was unlawful under the contract. The Court accordingly held that the Commission had erred in failing to reject United's filing, and directed that United make restitution to Mobile of all overpayments. *Id.*, at 347.

Under the rationale in *United Gas*, private parties have a right to establish a lawful rate by contract as long as the rate they have agreed upon is just and reasonable. When the contract rate is within the zone of reasonableness established by the Commission, that contract rate is presumptively lawful,[28] and not subject to unilateral change.[29] The Commission has no power to specify a rate other than the contract rate when that rate is itself just and reasonable.[30] Neither the filed rate

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[28] As the Court noted, whenever a new rate is filed, "the Commission's only concern is with the reasonableness of the *new* rate." 350 U. S., at 340 (emphasis in original).

[29] This prohibition is founded not only on the law of contracts, but also on the Act itself:

"Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." 350 U. S., at 344.

[30] While there are differences between this case and *United Gas*, it seems to me that the cases are nonetheless closely analogous. In the present case, as in *United Gas*, one party to a duly-filed contract attempted unilaterally to change the price at which natural gas would be sold under the contract. In *United Gas*, United did so directly by filing an increased rate with the Commission; in this case, the unilateral change was accomplished indirectly when Arkla prevented respondents from taking the steps necessary to recover the contractually-authorized higher rate. Of course, in *United Gas* the lawful contract rate had actually been approved by the Commission, while in this case the contract

doctrine, nor any other principle of federal regulatory law, requires the result the Court announces today.

IV

In an attempt to bolster its reliance on the filed rate doctrine, Arkla contends that we cannot be sure that, if respondents had been notified of the United States lease and had filed a new rate schedule in 1961, the Commission would have approved their new rates. This argument is supported by statements in an order entered by the Commission on November 5, 1980.[31] That order was entered after the petition for

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rate claimed by respondents has never been filed. This distinction is not, however, of controlling significance. In *United Gas*, the Court was confronted with two rates, both presumptively reasonable, of which only one was lawful under the contract. In the present case, we are confronted with essentially the same situation. While the rate ultimately awarded in *United Gas* had in fact been filed with the Commission, it was not the rate currently recognized by the Commission as "just and reasonable," because it had been replaced by the new rate filed by United. The Court nonetheless directed that Mobile pay only the old rate, which the Commission's order had purported to supersede. The lawful rate in *United Gas* is analogous to the contractually-authorized rate in this case because it was presumptively reasonable, having received Commission approval, but was not the currently applicable filed rate for the gas sales at issue. In light of this fact, I can see no reason why respondents should be precluded from recovering from Arkla a presumptively reasonable rate, well below applicable Commission rate ceilings, merely because Arkla's own breach of contract prevented respondents from filing that rate with the Commission.

[31] The Commission stated:

"Finally, we confess that we are at least troubled by the prospect of speculating as to what the Commission would or would not have done in 1961 had it been confronted at that time with a rate increase filing by the Hall group. . . . Whether the Commission in 1961 would have provided a forum for resolving the contractual dispute is a question we cannot answer definitively; . . . At that time, the Commission might well have concluded that the favored nations clause was not triggered. More importantly, even if the Commission in 1961 had reached the same contractional interpretation as the Louisiana court, the Commission might

certiorari had been filed, and after the United States and the Commission had taken the position as *amici* in this Court that the Louisiana Supreme Court had erred in awarding damages for the period between 1961 and 1972.[32] Because the Commission had decided to lend its support to Arkla in this Court, it is not surprising that some of the statements in that order are consistent with Arkla's argument. What is most significant about that order is the fact that the Commission does not advance any reason why a rate schedule filed by respondents in 1961 in accordance with the favored nations clause of their contract with Arkla would not have been deemed just and reasonable.

Although the Commission stated that it was reluctant to speculate about what its predecessors might have done in response to such a filing, the only issues that it now can describe as speculative are issues that have been decided against Arkla. I do not believe speculation that the Commission might have committed error in 1961 is an adequate reason for not presuming that just and reasonable rates would have been routinely approved when filed.

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have determined that the public interest would not permit the grant of rate increases based upon the triggering of favored nations clauses even in existing contracts." *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI76–28 (Nov. 5, 1980), in App. to Supplemental Memorandum for the United States and the Federal Energy Regulatory Commission as *Amici Curiae* 1a, 13a–14a.

[32] The petition was filed on May 29, 1979. On October 1, 1979, the Court requested the views of the Solicitor General. A brief was filed by the Solicitor General on behalf of the United States and the Federal Energy Regulatory Commission on February 11, 1980, in which the *amici* took the position that the Louisiana Supreme Court had erred. The *amici* maintained that the error was sufficiently serious to warrant review, but recommended that the Court defer action until the Commission had acted on respondents' request for a waiver of the § 4 (d) filing requirement. The Commission denied that request in its November 5 order, and shortly thereafter the *amici* recommended that certiorari be granted, and that the decision of the Louisiana Supreme Court be reversed.

The first issue on which the Commission indicates a reluctance to speculate is a question of contract interpretation, namely, whether the favored nations clause had been triggered by Arkla's arrangement with the United States. There is no reason for the Commission, or anyone else, to speculate on this question. The Commission twice was presented with the opportunity to decide this question, and it twice declined to do so.[33] That question now has been correctly resolved by the Louisiana courts. The other issue on which the Commission declines to speculate is whether its predecessor would have regarded a favored nations clause in a pre-1961 contract as lawful. Again, speculation is wholly unnecessary. The Commission actually confronted that precise issue in 1961. Although it concluded that such escalation clauses should be prohibited in the future, it specifically decided that it would not eliminate such provisions from previously executed contracts.[34] That the Commission's treatment of that issue in

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[33] On September 11, 1975, Arkla filed a petition with the Federal Power Commission requesting a declaratory order holding that the "favored nations" clause in its contract with respondents had not been triggered by the royalty payments made by Arkla to the United States. The Commission denied the petition, stating in part:

"This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction. The Commission has jurisdiction over rates, filing and notice as to both Arkla and Respondents. While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions." *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI76-28 (March 8, 1976), in Joint App. 177, 180 (footnote omitted).

On May 18, 1979, the Federal Energy Regulatory Commission reexamined this issue and came to the same conclusion, although for different reasons, in the order from which I have quoted in n. 14, *supra*.

[34] After explaining its reasons for prohibiting indefinite escalation clauses in newly executed contracts, the Commission stated:

"However, we are convinced that we cannot declare the escalation pro-

1961 is applicable to the contracts between respondents and Arkla is demonstrated by the fact that the escalated rates are accepted by the Court and the Commission for the purpose of computing respondents' damages for the period between 1972 and 1975. If the favored nations clause in this pre-1961 contract were not perfectly lawful, respondents would receive no damages at all, rather than the truncated recovery which the Court's holding today allows.

The Commission also has expressed concern about the impact of this damages award on its broader "regulatory responsibilities." See *Arkansas Louisiana Gas Co.* v. *Hall*, Docket No. RI76–28 (Nov. 5, 1980), in App. to Supplemental Memorandum for the United States and the Federal Energy Regulatory Commission as *Amici Curiae* 1a, 13a. Two specific concerns are identified—that the burden of the award might be passed on to consumers, and that it might give rise to other claims that favored nations clauses have been breached. The short answer to the first concern is that there is no more reason to assume that this award will justify an increase in

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visions in Pure's contracts with El Paso void or voidable, and thus in effect strike them from the contracts. There is no question but that these exceedingly material parts of the contracts were a basic part of the exchange between the parties in arriving at these agreements. Under familiar rules of law, if these material provisions are stricken, the contracts, which lack any provisions for the severability of parts found invalid, must also fall. This would result in legal and regulatory problems that might cause material harm to the public, harm that might well exceed the injurious effects of the escalation provisions themselves. For example, if these provisions were striken and the contracts fell, the producer's sales might then presumably constitute *ex parte* offerings of gas and the producer could change its rates at will, unimpeded by any contractual limitations of the kind that presently exist. Thus, instead of being limited under the *Mobile* and related decisions only to increases permitted by contractual provisions, the company could file for increases whenever it happened to feel justified in doing so. Thus the uncertainty and spiraling prices resulting from the escalation clauses might well be compounded many times over." *The Pure Oil Company*, 25 F. P. C. 383, 388–389 (1961).

utility rates than any other damages judgment that a public utility may be required to pay; if the regulatory concern is valid, the agency having jurisdiction over Arkla's sales has ample authority to require its stockholders rather than its customers to bear this additional cost. The second concern seems exaggerated because it applies only to contracts executed before 1961, see *supra*, at 21–22, and n. 34, and it seems unlikely that many large purchasers of natural gas could successfully have concealed violations of escalation clauses from their suppliers. To the extent that this case does have counterparts in such contracts, however, it seems to me that those cases should be decided in the same way. After all, we are concerned here merely with cases in which a utility has failed to pay an agreed price that is well below the just and reasonable ceiling set by the Commission.

I agree that speculation about what the Commissioners might have done in 1961 is inappropriate. Unlike the Court, however, I see no need to speculate in this case. Rather than speculate, I would presume that the Commission would have acted in a lawful manner and that it would then have perceived the correct answer to disputed questions that have subsequently been resolved.

In my judgment, the Court's decision today is founded on nothing more than the mechanical application to this case of principles developed in other contexts to serve other purposes. The Court commits manifest error by applying the filed rate doctrine to ratify action by Arkla that not only breached its contract with respondents, but also directly undercut the substantive policies identified in § 4 of the Natural Gas Act. Because absolutely no federal interest is served by today's intrusion into state contract law, I respectfully dissent.

APPENDIX D

STATUTES AND REGULATIONS

Sections 4(a), (b), (c), (d), and (e) of the Natural Gas Act

§ 717c. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such

notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding intitiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision

found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.

Section 19(b) of the Natural Gas Act

§ 717r. Rehearings; court review of orders

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such

additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

Sections 154.91 through 154.95 and Section 154.98 of the Commission's Regulations

COMPLIANCE BY NATURAL GAS PRODUCERS AND GATHERERS WITH CERTIFICATE AND RATE REQUIREMENTS

§ 154.91 Applicability.

(a) *Definition.* An "independent producer" as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas (other than gathering) by pipeline in interstate commerce.

(b) *Filings by operators signatory to a gas sales contract.* (1) Where the operator (i) of a natural gas producing property (not a producer selling pursuant to a percentage formula under paragraph (e) of this section), or (ii) of a plant processing natural gas and located in or near the production area of the gas it processes is a signatory party to a contract for the sale of the gas produced or processed, the operator shall make all the filings required under §§ 154.92 (rate schedules), 154.94 (changes in rate schedules), or 157.23 (applications for certificates) of all signatories for such sale, as well as for the sale and delivery (according to the terms of the contract) of the gas of nonsignatory co-owners. Notwithstanding this requirement for filings by operators, a co-owner who is a signatory party to a contract of sale of natural gas may, but he

need not, make his own filings under §§ 154.92, 154.94 and 157.23 in addition to the filings required of the operators.

(2) As a part of his application for a certificate of public convenience and necessity, the operator shall file: (i) A copy of the contract or contracts for the sale of gas in interstate commerce for resale; (ii) the names and percentages of ownership of co-owners whose interest in production is to be delivered to the purchaser under the terms of such contract or contracts; and (iii) a copy of the sales authorization from, or operating agreement with, any non-signatory co-owners whose gas is so to be delivered.

(c) *Filings by signatory co-owners.* (1) Where gas is delivered by a well, unit, or plant operator under the terms of a contract of sale of an owner or owners to which the operator is not a signatory party, each signatory owner is responsible for making the filings required by §§ 154.92, 154.94 and 157.23 to cover the sale, but any such filings may be made and accepted to cover other co-owners who are joint signatories to the sales contract. As a part of his application for a certificate of public convenience and necessity, such owner shall file a single statement setting forth:

(i) The names of the co-owners (signatory or non-signatory) to whose accounts the gas so delivered is to be credited; (ii) the per centum of ownership of such owners in the well, unit, or plant, and (iii) a copy of the contract or contracts for the sale of gas in interstate commerce for resale. Also, such owner, either at the close of each calendar year or at the end of each twelve-month period following the date of initial filing, shall submit a statement listing any changes in the ownership of working interests, producers, or plant ownership occurring subsequent to the filing of a prior statement hereunder.

(2) Where the operator is an interstate pipe-line transmission company and delivers the gas into its own lines for interstate transmission it shall file a statement setting forth the names of all the co-owners whose gas is so delivered and the respective per centum of ownership therein, and such co-owners shall make all required filings.

(d) *No filings by non-signatories.* Where, under paragraph (b) or (c) of this section, filings of rate schedules, rate changes, and certificate applications covering the sale

are required of the operator or of the signatory owners, a non-signatory co-owner may not file rate schedules, rate changes, or certificate applications where his gas is being sold or delivered by the operator according to the terms of a contract to which the co-owner is not a signatory party, whether or not the filings by operator or co-owner as above required have been made. However, the non-signatory co-owner whose gas is being sold by the operator may, where he has reserved the right to do so, elect to take his gas in kind and dispose of it otherwise if and when there has first been obtained authorization therefor to the extent required by section 7 (b), and 7 (c), or other applicable provisions of the Natural Gas Act, and filings have been made as required by section 4 thereof.

(e) *Percentage sales.* Where a producer sells to the operator of a processing plant at a price which is a percentage of the proceeds from the resale of the residue gas, the plant operator shall make all filings required to cover the sale by such producers, which filings shall include a list of the producers from whom the natural gas is purchased, showing the per centum of the resale price received by each from such sale of gas. At the close of each calendar year or at the end of each twelve-month period following the date of initial filing the operator shall submit a further statement listing any changes in the producers from whom the gas is purchased or in the percentum they receive. In cases of percentage sales by producers covered by this paragraph, the producers may not file rate schedules, rate changes, or certificate applications, whether or not the filings by operator as herein required have been made. However, such producer is fully subject to applicable provisions of the Natural Gas Act, including sections 5 and 7 (b).

(f) *Filings by certain nonsignatories.* Where the operator and the signatory co-owners in a particular sale are exempt with respect to such sale pursuant to § 157.40, and where any nonsignatory co-owner's interests are not covered by such exemption, such co-owner may file rate schedules, rate changes, or certificate applications with respect to such interests notwithstanding the provisions of paragraph (d) of this section.

OMB CONTROL NO.: 1902-0070.

(Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[Order 190, 21 FR 7617, Oct. 4, 1956, as amended by Order 243, 27 FR 1356, Feb. 14, 1962; Order 429, 36 FR 5601, Mar. 25, 1971; Order 556, 41 FR 52443, Nov. 30, 1976; 47 FR 614, Jan. 6, 1982]

§ 154.92 Filing of rate schedules by independent producer.

(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisidiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule, there shall be attached a billing statement, in the format specified in § 250.14.

(b) Every independent producer who subsequent to the effective date of this part, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in § 154.93, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement in the format specified in § 250.14, which shows the estimated sales and billing for the first month of service, in sufficient detail to show the method of billing and price used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this section file a statement showing (1) the approximate annual volume involved, (2) the rate charged therefor, (3) the name of the purchaser, and (4) the geographical location (field, county and State) at which delivery is made.

(d)(1) Every independent producer seeking authority to render natural gas service previously authorized by the Commission, as successor in interest in all the properties or other rights covered by a particular rate schedule, shall file three copies of the instrument of assignment whereby the assignee acquired the properties (or rights therein) involved, along with a request that the assignor's rate schedule be redesignated as the rate schedule of the assignee. He shall also file three copies of an informational summary, in the form prescribed in § 250.8 of this chapter, for each contract of sale or transportation of gas involved in the assignment.

(2) Where the authority being sought under paragraph (d)(1) of this section relates only to an assigned portion of the rights covered by the rate schedule of the assignor, the assignee shall file, as his rate schedule, three copies of the assignor's basic contract of sale, as amended, and of the instrument of assignment together with the informational summary required by paragraph (d)(1) of this section.

(3) If the rate schedule of the assignor relating to the rights assigned is in effect subject to refund or if the sale is being made by the assignor under temporary authorization subject to a rate refund condition, authority to render service will be granted to the assignee only upon condition that he file assurance by way of bond or undertaking that he will refund, at such times and in such amounts to such persons as the Commission may find to be entitled thereto any portion of the rate which had been permitted to become effective pursuant to § 154.102 or the rate condition in the assignor's temporary authorization, as may be found by the Commission not to be justified. Assignee's obligation to refund, in the absence of his voluntary assumption of some greater proportion of assignor's liability, shall attach as of the effective date of the Commission's order granting the assignee a certificate or temporary certificate as the base may be unless otherwise ordered or provided.

OMB CONTROL NO.: 1902-0055.

(Natural Gas Act, 15 U.S.C. 717-717w; Dept. of Energy Organization Act, 42 U.S.C. 7101-7352; E.O. 12009, 3 CFR 142; Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[Order 174-B, 19 FR 8808, Dec. 23, 1954, as amended by Order 278, 29 FR 3699, Mar. 25, 1964; Order 556-A, 42 FR 41276, Aug. 16, 1977; Order 196, 46 FR 60432, Dec. 10, 1981; 47 FR 614, Jan. 6, 1982]

§ 154.93 Rate schedule defined.

For the purpose of §§ 154.92 through 154.101 "rate schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission: *Provided*, That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

(a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

(b) Provisions that change a price to a specific amount at a definite date;

(b-1) Provisions that permit a change in price to the applicable just and reasonable area ceiling rate which has been, or which may be, prescribed by the Commission for the quality of the gas involved; and

(c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph (b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question: *Provided further*, That any contract executed on or after April 2, 1962, containing price-changing provisions other than the

permissible provisions set forth in the proviso next above shall be rejected.

OMB CONTROL NO.: 1902-0055.

(Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[Order 242, 27 FR 1357, Feb. 14, 1962, as amended by Order 329, 31 FR 15486, Dec. 8, 1966; 47 FR 614, Jan. 6, 1982]

§ 154.94 Changes in rate schedules.

(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to § 154.92, without first filing a change in rates pursuant to section 4(d) of the Natural Gas Act and in accordance with this section.

(b) Except as provided in paragraphs (h) and (i) of this section, every change in any rate schedule, rate, charge, classification, or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to § 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to § 154.92 shall be filed with the Commission by an original and three copies not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to

September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

(e) With each change in rate schedule not constituting a change in rate level by any means there shall be submitted reasons, nature and basis for the proposed change and the date upon which the change is proposed to be made effective. Changes in service such as compression, dehydration, etc., by either seller or buyer shall be considered as a change in the existing rate level.

(f) *Notice of change in rate level.* An independent producer who is proposing a contractual change in rates, charges, etc., shall file the information, specified in § 250.14.

(g) A complete copy of all material filed pursuant to this section shall be furnished to each party to the rate schedule. With each such filing there shall be submitted to the Commission a list of the parties to whom such material has been furnished.

(h) *Blanket filing*—(1) *General rule.* An independent producer may file a blanket affidavit under this paragraph under which he may collect any maximum lawful price (including periodic escalations) which is applicable under section 104(b)(1)(A), 106(a), 102(d) or 108 of the Natural Gas Policy Act of 1978 (NGPA), and to which he is entitled on the basis of having qualified under the Natural Gas Act (NGA) for a base rate. Such maximum lawful price may be collected only in accordance with this paragraph.

(2) *Base rate.* For purposes of this paragraph:

(i) *Definition.* "Base rate" means a just and reasonable rate under the NGPA applicable to a first sale of natural gas or a rate under sections 102(d) or 108 of the NGPA for which a jurisdictional agency's determination of eligibility has become final within the meaning of § 273.102 of the chapter.

(ii) *Establishment of base rate.* An independent producer has established qualification for a base rate if: (A)

He has made a rate filing with the Commission under § 154.92 or the preceding paragraphs of this section to collect such base rate; (B) such rate filing has taken effect; and (C) except in the case of minimum rate gas (as defined in § 271.402(b)(9) of this chapter) collection of such rate is permissible under the applicable sales contract.

(iii) *Date of base rate.* An initial rate filing under § 154.92 to collect a base rate has taken effect if such filing has been accepted by the Commission. A rate change filing under the preceding paragraphs of this section to collect a base rate takes effect on the thirty-first day after the date of filing (or any later effective date specified in the filing), unless such filing has been suspended or rejected. In the case of natural gas eligible under section 102(d) or 108 of the NGPA, a rate change filing under the preceding paragraphs of this section to collect the applicable maximum lawful price which is filed within thirty days of the date a determination of eligibility has become final under § 273.102 of this chapter takes effect on the date such determination becomes final or the date of initial deliveries, whichever is later. In the case of final determinations made before March 31, 1979, such rate change filings take effect on the date of final determination if the rate change is filed on or before April 30, 1979.

(3) *Sales covered by affidavit.* An affidavit under paragraph (1) covers:

(i) Any first sale for which qualification to collect the base rate has been established before the date of filing of the affidavit, if such first sale is listed in the affidavit, and

(ii) Any first sale for which qualification to collect the base rate is established on or after the date of filing of the affidavit, if the filing to establish the base rate states that upon establishment of qualification for the base rate, the first sale will be covered by such affidavit.

(4) *Effective date of coverage under affidavit.* (i) An affidavit filed before December 30, 1978, is effective with respect to deliveries, pursuant to a first sale, beginning at the later of December 1, 1978, or the date of qualification of such first sale for the base rate.

(ii) An affidavit filed on or after December 30, 1978, is effective with respect to deliveries, pursuant to a first

sale, beginning at the later of the date of qualification of such first sale for the base rate or the date of filing of the affidavit.

(iii) Affidavits filed with respect to natural gas eligible under section 102(d) or 108 of the NGPA, and filed concurrently with rate change filings to collect the base rate, become effective as to deliveries pursuant to a first sale beginning on the date the rate change filing takes effect.

(5) *Effect of affidavit.* An affidavit filed under this paragraph shall be deemed to be a notice of change of rate for purposes of section 4(d) of the NGA. A filing made under this paragraph does not constitute a waiver of the right to apply for a higher rate under section 104(b)(2) or 106(c) of the NGPA.

(6) *Form.* Any affidavit filed under paragraph (h)(1) of this section shall be signed in accordance with § 274.201(c) of this chapter. The form for such affidavit appears as Appendix A to this section. Concurrently with any filing made under this paragraph, the filing party must serve each affected purchaser with a copy of the affidavit.

(7) *Contractual authorization.* Except in the case of minimum rate gas (as defined in § 271.402(b)(9) of this chapter), neither the filing of a blanket affidavit, nor the acceptance for filing of such an affidavit by the Commission, will affect any person's contractual right to purchase natural gas at a rate which is less than the applicable maximum lawful price under the NGPA. For special rules respecting contractual authorization to collect NGPA rates, see § 270.205.

(8) *Protests.* Any protest to a blanket affidavit shall be submitted to the Commission.

(i) In the case of a protest by the purchaser in the first sale, within 60 days from the filing of the blanket affidavit or August 15, 1979, whichever is later; or

(ii) In any other case, within 60 days of the filing of the evidentiary submission referencing the contract which governs the sales covered by the blanket affidavit, or October 15, 1979, whichever is later. A protest under this clause shall also be served upon the purchaser in the first sale.

(i) *Interim and retroactive collections*—(1) *Filings.* Compliance with the applicable filing requirements imposed by §§ 273.201(c), 273.202(d), 273.203(c), and 273.204(c)(3) of this chapter shall be deemed to satisfy the requirements of paragraph (b) of this section and section 4(d) of the Natural Gas Act for first sales of natural gas to which the Natural Gas Act remains applicable and for which an interim or retroactive collection is authorized by Part 273 of this chapter. The 30 day notice otherwise required by section 4(d) of the Natural Gas Act is waived.

(2) *Contractual authorization.* Neither the filing described in paragraph (i)(1) of this section nor the acceptance of such filing by the Commission, will affect any person's contractual right to purchase natural gas at a rate which is less than the applicable maximum lawful price under the NGPA.

(3) *Protests.* (i) Any protest shall be submitted to the Commission.

(A) In the case of a protest by the purchaser in the first sale, within 60 days from the date of such filing or August 15, 1979, whichever is later; or

(B) In any other case, within 60 days of the filing of the evidentiary submission referencing the contract which governs the sales covered by the interim or retroactive collection filing, or October 15, 1979, whichever is later. A protest filed under this subclause shall also be served upon the purchaser in the first sale.

(ii) If a protest is made with respect to a filing under paragraph (i)(1) of this section, on the grounds of lack of contractual authorization, then notwithstanding § 273.302(f) of this chapter, any refund obligation under § 273.302 of this chapter shall continue until contractual authorization is established or until refund is made in accordance with the direction of the Commission.

(j) *Evidentiary submission by pipeline, protest procedure.* (1) *Evidentiary submission.* Each interstate pipeline which purchases natural gas in a first sale and sells such gas for resale shall file an evidentiary submission which shall include:

(i)(A) The rate schedule number assigned by the Commission for each contract for each first sale of natural gas

for which the seller has made a rate increase filing under paragraph (h) or (i) of this section;

(B) The date of the contract for each first sale of natural gas by a small producer for which the small producer has asserted the right to collect the maximum lawful price under the NGPA.

(ii) The name of the seller for each contract listed in subparagraph (1)(i) of this paragraph;

(iii) The section or sections of the NGPA which are applicable to each first sale of natural gas under each contract listed in paragraph (i)(1)(i) of this section;

(iv)(A) A statement specifying whether or not, in such pipeline's opinion, the seller has contractual authority to collect the filed-for NGPA rate, and (B) the text of any contract provisions, and any other evidence, which the pipeline believes constitutes, or may constitute, contractual authority for the seller to charge and the pipeline to pay a maximum lawful price under the NGPA; and

(v) The rate schedule number (or if none has been assigned, the date of the contract) for each natural gas contract listed in paragraph (j)(1)(i) of this section with respect to which the pipeline has filed a protest on grounds of lack of contractual authorization under paragraph (h)(8) or (i)(3) of this section or under § 157.40(1)(c)(v)(B).

(vi) Any requirement of this section for data which has previously been submitted in an evidentiary submission under this section may be satisfied by a specific reference sufficient to locate the data in the prior evidentiary submission.

(2) *Filing.* (i) The evidentiary submission required by paragraph (j)(1) of this section shall be filed with the Commission, and, if requested, served on the seller in the sale, and any state Commission, interstate pipeline or local distribution company. In the case of all contracts except small producer contracts, the evidentiary submission shall be filed by the later of:

(A) August 15, 1979, or

(B) 60 days from the date the pipeline received notice of:

(*1*) An interim collection to be made pursuant to § 273.202(d)(1);

(*2*) A retroactive collection to be made pursuant to § 273.204(c)(3)(iii); or

(*3*) A filing pursuant to paragraph (h)(6) of this section. In the case of small producer contracts, as defined in § 157.40(a), the evidentiary submission shall be filed no later than September 5, 1979, or, not later than 60 days after the date on which the pipeline knew or should have known of the seller's assertion of contractual authority to charge and collect a maximum lawful price under the Natural Gas Policy Act of 1978, whichever is later. In either case, the seller in the first sale may request a service list of the parties served with the evidentiary filing.

(ii) The seller in the first sale may submit, to the Commission and any other party served with the evidentiary submission, any supplemental information deemed relevant to the evidentiary submission.

(3) *Contents of protests.* Each protest filed under paragraph (h)(8) or (i)(3) of this section or § 157.40(c)(1)(v)(B) shall

(i) Specifically identify the contract which is protested,

(ii) Set forth the text of the contractual provisions which the protestor believes is inconsistent with the conclusion that the contract authorizes the seller to collect the filed-for NGPA rate, and the specific reasons why the protestor believes such inconsistency exists, and

(iii) May include any other evidence which the protestor believes is relevant to the issue of the existence of contractual authorization to collect the NGPA rate.

(4) *Protest procedure.* (i) Each protest filed under paragraph (h)(8) or (i)(3) of this section or § 157.40(1)(c)(v)(B) of this subchapter shall be noticed in the FEDERAL REGISTER and transmitted to the Chief Administrative Law Judge for assignment to an Administrative Law Judge. A protest will be set for hearing unless summary disposition is made of the protest.

(ii) Upon receipt by the Commission of any protest referred to in paragraph (j)(i) of the section, the seller in the first sale shall be joined as a party.

(iii) Upon receipt by a pipeline of any third-party protest referred to in paragraph (j)(4)(i) of this section, the pipeline shall mail within thirty days to the seller under the contract a copy of such third-party protest. For purposes of this clause, a third-party protest is a protest by a party who is not a party to the contract which is protested.

(5) *Authority of Chief Administrative Law Judge.* (i) In the case of any proceeding relating to a protest filed under paragraph (h)(8) or (i)(3) of this section or under § 157.40(1)(c)(v)(B), the Chief Administrative Law Judge is authorized to issue such procedural orders, including orders setting matters for hearing, severing and consolidating proceedings and certifying questions to the Commission, as he determines necessary or appropriate for the expeditious consideration of such protests. The Chief Administrative Law Judge may, by such order, authorize the Administrative Law Judge to whom a protest is assigned to issue similar procedural orders relating to that protest.

(ii) Part I of the Commission's regulations (relating to rules of practice) shall apply to such protest proceedings except to the extent otherwise provided by a procedural order issued under paragraph (j)(5)(i) of this section. Section 1.28 of this chapter shall apply to any procedural order issued under paragraph (j)(5)(i) of this section.

APPENDIX A TO § 154.94

BLANKET AFFIDAVIT FILING UNDER § 154.94(h)

_____ (the affiant) certifies that he is _____ (exact legal title or capacity of the affiant) of ____ (filing party) and, that:

(1) Under 18 CFR 154.94(h) the filing party is entitled, and intends, to collect a maximum lawful price (including periodic escalations) under section 104(b)(1)(A), 106(a), 102(d) or 108 of the Natural Gas Policy Act of 1978 (NGPA) for each of the sales identified in the form attached as Exhibit A to his affidavit; and

(2) He will notify the Commission that additional first sales are covered by this affidavit in accordance with the requirements of § 154.94(h).

The undersigned swears or affirms that with respect to each rate filing under 18 CFR 154.92 or 154.94 which is identified in Exhibit A and on which he relies to collect the applicable price under this affidavit, he has made a diligent inquiry of individuals with personal knowledge of the facts contained in such filing and has determined after such inquiry that all statements made in such filing are true and accurate to the best of his knowledge, information and belief concerning, among other things, the factors relating to the eligibility to charge the rates therein, and that he has examined the prices to be charged under the NGPA for sales covered by this affidavit and found them to be in accordance with sections 104(b)(1)(A) and 106(a) of the NGPA.

Signature _____

Respondent name and code _____

EXHIBIT A

Rate schedule No.	Buyer name	Applicable just and reasonable rate previously established under NGA	Applicable NGPA rate	Effective date of rate establishment

INSTRUCTIONS FOR COMPLETING

EXHIBIT A

I. *General Instructions.* Exhibit A shall be attached to the affidavit filed pursuant to § 154.94(h)(1) to identify those sales that qualify for the maximum lawful price permitted under sections 104, 106(a), 102(d) or 108 of the NGPA. Where necessary, the list may be continued on succeeding pages in the same form. An affidavit and Exhibit A thereto may be filed in conjunction with a qualifying initial service application and should be attached to the billing statement filed therewith.

II. *Specific Instructions. Respondent Name and Code:* Enter the name of the respondent and the code, if any, assigned to the respondent from the publication entitled Buyer/Seller Codes.

FERC Rate Schedule Number: Enter the rate schedule number assigned by the FERC. If none, enter the contract date.

Buyer Name: Enter the buyer name.

Applicable Just and Reasonable Rate Previously Established Under the NGA: Enter either the base rate (Mcf at 14.73 psia) reflected in the last notice of change in rate submitted for the vintage involved or the base rate reflected in the initial billing statement. *See* § 250.14 of this chapter.

Applicable NGPA Rate: Enter the maximum lawful MMBtu ceiling price (excluding taxes) for the vintage involved.

Effective Date of the Rate Establishment: Enter the proposed effective date of the NGPA rate.

OMB CONTROL NO.: 1902-0055.

(Natural Gas Act, as amended, 15 U.S.C. 717 et seq., Department of Energy Organization Act, Pub. L. 95-91, 42 U.S.C. 7101-7352 and 7107 et seq. E.O. 12009, 42 FR 46267 Natural Gas Policy Act of 1978, Pub. L. 95-621, 15 U.S.C. 3301 et seq., Administrative Procedure Act, 5 U.S.C. 553, 3 CFR 142; Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[Order 174-B, 19 FR 8809, Dec. 23, 1954]

NOTE: For amendments to § 154.94, see the List of CFR Sections Affected in the Finding Aids section in the back of this volume.

§ 154.95 Oral agreements.

If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in triplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in triplicate, their understanding of the agreement.

OMB CONTROL NO.: 1902-0055.

(Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[Order 174-B, 19 FR 8809, Dec. 23, 1954, as amended by Order 202, 23 FR 3716, May 29, 1958; 47 FR 614, Jan. 6, 1982]

§ 154.98 Waiver of notice requirements.

Upon application and for good cause shown, the Commission may by order provide that a rate schedule or a change in rate schedule shall be effective on less than 30 days' notice. The Commission upon request and for good cause shown may permit a rate schedule or a change in rate schedule to be filed prior to 90 days before the effective date.

OMB CONTROL NO.: 1902-0055.

(Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[Order 174-B, 19 FR 8809, Dec. 23, 1954, as amended at 47 FR 614, Jan. 6, 1982]

APPENDIX E

Gas Purchase Contract Litigation

Another area of the law that has produced significant litigation in the past term is gas purchase contract problems. Such contracts are complex and are today signficantly affected by federal regulation under the Natural Gas Act of 1938[43] and now the Natural Gas Policy Act of 1978.[44] A division between "interstate gas" and "intrastate gas" has profoundly influenced production and marketing in the past, and on "interstate gas," gas purchase contract terms have been dictated by the Federal Power Commission (recently succeeded by the Federal Energy Regulatory Commission).

Payment of Royalty; Purchase of Gas; Favored Nation Clause

The Louisiana Supreme Court issued a significant decision in one gas purchase contract case, *Hall* v. *Arkansas-Louisiana Gas Co.*[45] The controversy arose from a contract pertaining to the Sligo Field in Bossier Parish for the purchase of gas by the defendant Arkansas-Louisiana Gas (Arkla) for a term of twenty-eight years, beginning in 1952. The agreement contained a "two party favored nation" clause in which Arkla promised that, should it purchase gas from any other seller in the field at a higher price, it would escalate the purchase price to the sellers (plaintiffs here) under the 1952 agreement to the same price. In 1961 Arkla acquired, through an assignment, a fifteen percent working interest in an oil and gas lease granted by the United States on land in the Sligo field. As a lessee under this lease, Arkla was bound to pay a royalty to the United States; the United States could elect to be paid its royalty in kind or on the basis of the fair market value attributed to its percentage of production. The government chose

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[43] 15 U.S.C. §§ 717-17w (1976).

[44] 15 U.S.C.A. §§ 3301-432 (1979).

[45] 368 So. 2d 984 (La. 1979).

the latter method; and, unlike other lessors, the government had the power under the lease to specify the value of the gas for purposes of royalty computation. The value specified by the government for Arkla's royalty was higher than the purchase price paid by Arkla to the plaintiffs under the 1952 gas purchase contract. The plaintiffs brought suit claiming the royalty payment was a purchase within the meaning of the favored nation clause, thus triggering an escalation of the price. Although remanding the case for recomputation of damages, the supreme court affirmed the second circuit's affirmation of a trial court judgment for plaintiffs.

There are several troublesome aspects to the *Hall* case, but the most significant is the court's determination that a payment of royalty, in which the lessor has the option of taking the gas in kind and the power to specify the value upon which the royalty is paid, is a purchase of gas by the lessee. If the option of taking or not taking the gas was the lessee's, the taking of gas and the paying of a royalty would seem more clearly a purchase. And if the "price" paid for that gas were set by some factor other than the determination by the lessor of the gas's value, that would lend itself to the conclusion that there had been a "purchase." But such was not the case.

Consider the dilemma of the purchaser of gas who is also a producer in similar circumstances under the court's approach. Its only choices are to pay the royalty specified by the United States, and thus trigger the escalation clause, or to give up the lease when the government demands a royalty for gas valued at a higher level than the sale price of other gas in the field, and thus lose not only the royalty gas of the lessor but also all the working interest gas. Neither of these seems a very sound choice, and it brings out the point that the election of the *lessor* not to take gas in kind is not a purchase of the gas by his *lessee*. This is not to suggest that a regulatory agency could not for some purposes treat it as a sale of gas (or oil under a similar provision in a lease) or that the parties themselves could not define it to be a purchase. The issue is whether these parties meant to treat it as a purchase for purposes of the gas purchase

contract escalation clause, and it is doubtful that most people in the industry would regard it as a purchase. Accordingly, it strikes this writer as a questionable proposition. Nevertheless, the supreme court allowed recovery for damages all the way back to the time when defendant first paid the higher royalty to the United States, even though the Federal Power Commission, which had jurisdiction over the purchase price, would have had to allow the operation of the escalation clause for there to have been damage.[46] The court felt it was the defendant's fault that prevented a determination on that issue by the F.P.C. at the time of the "purchase."[47]

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[46] The Federal Power Commission would allow price escalation clauses in very narrow circumstances after April 3, 1961, Order 242, 18 C.F.R. § 154.93, 27 Fed. Reg. 1356 (1962), and limited their operation in contracts in effect on June 7, 1954, Order 174-B, 18 C.F.R. § 154.94, 19 Fed. Reg. 8809 (1954).

[47] The court relied on Civil Code article 2040 which provides: "The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it." The only way in which the defendant "prevented" fulfillment of the "condition" (filing of a new rate schedule in hopes of getting F.P.C. approval of a higher rate) was failing to inform plaintiffs of the "purchase" by the defendant.